Supreme Court, U.S.
FILED
SEP 6 2000
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

LOCAL UNION 148, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.,
Suite 1000
Washington, D.C. 20005
(202) 842-2600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

30pp

QUESTION PRESENTED

Whether there is an exception—privileging employer lockouts in reprisal for employee protected, concerted activity and with the object of forcing the employees to cease such activity—to the basic National Labor Relations Act anti-discrimination provisions making adverse employer action in reprisal for NLRA-protected employee activity an unfair labor practice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
1. The Background Facts	2
2. The ALJ's Decision	4
3. The Board's Decision	6
4. The D.C. Circuit's Opinion	8
REASONS FOR GRANTING THE WRIT	10
1. The Decision Below Violates Basic NLRA Anti-Discrimination Principles	13
2. This Court's Bargaining Lockout Jurisprudence Does Not Authorize Lockouts in Reprisal for Protected, Concerted Activity	20
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

Allied Industrial Workers v. NLRB, 476 F.2d 858 (D.C. Cir. 1973) 19

American Ship Building v. NLRB, 380 U.S. 300 (1965) ..... *passim*

Birch Run Welding & Fabricating v. NLRB, 761 F.2d 1175 (6th Cir. 1985) 19

Central Illinois Public Service Company, 326 N.L.R.B. No. 80 (1998) ..... *passim*

Highland Superstores, 314 N.L.R.B. 146 (1994) 15-18

Local 702, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. NLRB, 215 F.3d 11 (D.C. Cir. 2000) ..... *passim*

Majestic Molded Products, Inc. v. NLRB, 330 F.2d 603 (2d Cir. 1964) 19

Merchants Truck Line v. NLRB, 577 F.2d 1011 (5th Cir. 1978) 19

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 13-14

Molon Motor and Coil Corp. v. NLRB, 965 F.2d 523 (7th Cir. 1992) 14

Movers and Warehousemens Ass'n of D.C. v. NLRB, 550 F.2d 962 (4th Cir. 1977) 17

NLRB v. Brown Food Store, 380 U.S. 278 (1965) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 13-14

NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) 6

NLRB v. Insurance Agents, 361 U.S. 477 (1960) 11, 20

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 14

NLRB v. Zelrich Co., 344 F.2d 1011 (5th Cir. 1965) 15

Packerland Printing Co. v. NLRB, 494 F.2d 293 (7th Cir 1974) 14

Reno Hilton Resorts v. NLRB, 196 F.3d 1275 (D.C. Cir. 1999) 14

Riverside Cement Co., 296 N.L.R.B. 840 (1989) 9, 16, 18-19

Secretary of Agriculture v. United States, 347 U.S. 645 (1954) 17

Teamsters v. NLRB, 863 F.2d 946 (D.C. Cir. 1988) 14

Thrift Drug Co., 204 N.L.R.B. 41 (1973) 9, 16-17, 19

Wright Line, 251 N.L.R.B. 1083 (1980) 5

STATUTES

28 U.S.C. § 1254(1) 1

National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*:

29 U.S.C. § 151 ..... 13, 22

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 157 ..... *passim*

29 U.S.C. § 158(a)(1) ..... *passim*

29 U.S.C. § 158(a)(3) ..... *passim*

SECONDARY AUTHORITIES

Note, "Lockouts—Employers Lockouts with Temporary Replacements is an Unfair Labor Practice," 85 Harv. L. Rev. 680, 686 (1972)..... 7

PETITION FOR A WRIT OF CERTIORARI

Local Union 702, International Brotherhood of Electrical Workers, AFL-CIO, and Local Union 148, International Union of Operating Engineers, AFL-CIO, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Local 702, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. NLRB*, Nos. 99-1137/99-1139 (D.C. Cir. May 9, 2000).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 215 F.3d 11, and is reproduced in the separately bound appendix to this petition at App. 1a-14a. The opinion of the National Labor Relations Board ("the Board"), is currently reported in slip form at 326 NLRB No. 80 and in electronic form at 1998 WL 600788, and is reproduced in the appendix to this petition at App. 15a-262a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 2000. On July 31, 2000, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 6, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (a)(3) provide in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> [or]
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

STATEMENT OF THE CASE

1. The Background Facts

Petitioners—Local Union 702, International Brotherhood of Electrical Workers and Local 148, International Union of Operating Engineers (collectively "the Unions")—represent some 1,500 employees at Central Illinois Public Service Company ("CIPS" or "the Company"), a public utility that supplies electricity and natural gas in central and southern Illinois. App. 17a.[1]

In April 1992—with the extant labor agreements due to expire—CIPS and the Unions began collective bargaining negotiations looking to new agreements. App. 17a.

In March 1993—with the parties having agreed to a series of extensions of the prior contracts during negotiations but having failed to agree on mutually acceptable successor contracts—CIPS submitted its "final offer" to the Unions. App. 17a, 73a.

---

[1] Because the Court of Appeals accepted the Board's findings of fact, see App. 5a, this factual recitation draws from the findings of the Board's opinion and the findings of the Administrative Law Judge ("ALJ") opinion accepted by the Board.

On April 23, 1993, the day before the last contract extensions expired, the Unions rejected the Company's final offer. At that point, the Unions, rather than going on strike, determined to work without a contract for the duration of the negotiations and to institute a "work-to-rule" program (also referred to as an "inside-game" program). App. 17a, 76a.

Pursuant to that determination, Local 702 business agent Dan Miller immediately prepared written suggestions for work-to-rule activities and distributed those suggestions to the Union's shop stewards. App. 18a, 97a.

The next day, Charles Baughman, CIPS' Human Resources Manager, approached Miller with a copy of the suggested work-to-rule activities and stated that CIPS "was not going to put up with this shit." App. 18a.

Some three weeks later, on May 20, 1993, Baughman personally notified the Unions that the Company was instituting a lockout of all bargaining-unit employees as "a response to the work-to-rule practices and the refusals to work overtime and to provide medical information on sick leave forms." App. 19a. That same day, Clifford Greenwalt, CIPS' Chief Executive Officer, sent letters to employees represented by Local 702 which "elaborated further on the reasons for the lockout," to the same effect. *Id.*[2] CIPS also "sent substantially similar letters to employees represented by Local 148." *Id.*

---

[2] Insofar as it is relevant to this Petition, the letter stated:

> Based on the events of the last few weeks, I do not feel there is any other alternative. During this period, the Company has failed to receive what it is entitled to from employees represented by IBEW Local 702 in return for the wages and benefits which make it possible for you to provide your families with security and well-being. We have consistently encountered refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel. These conditions are neither acceptable nor warranted. [*Id.*]

2. The ALJ's Decision

The Unions filed unfair labor practice charges with the NLRB, alleging, *inter alia*, that the lockout violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (a)(3). On investigation of those charges, the NLRB General Counsel issued an NLRA §§ 8(a)(1) and 8(a)(3) complaint against CIPS. After a nine-week hearing on that complaint, the ALJ concluded that the lockout was an unfair labor practice.

The ALJ first addressed CIPS' basis for locking out its bargaining-unit employees and found that CIPS took this action simply and solely "in reprisal for the inside game actions . . . regardless of whether such actions constituted protected concerted or union activity, and in a determine[d] effort to stop those actions." App. 85a.

Next, the ALJ addressed the nature of the Union's "work-to-rule" program. The ALJ found that this program "consisted of: (1) refusals to work voluntary overtime, or overtime which was otherwise within the allowable discretion of the employee to accept or reject; (2) reasonable work-to-rule practices; and (3) presentation of grievances as a group." App. 240a. On the basis of these findings, the ALJ concluded that the employees' actions "constituted protected activity under the Act." *Id.*.[3]

---

[3] In reaching this conclusion, the ALJ found that there "was no work slowdown campaign" and no "'partial' or 'intermittent' strikes," App. 169a; that overtime was not mandatory under the contract and that "employees declined only historically voluntary overtime, and accepted historically forced overtime except in a few cases where they gave proper excuses . . . which were not questioned," App. 184a; and that there were no "excessive or unreasonable work-to-rule practices," App.170a.

It is also worthy of note that the record discloses but a single group grievance presentation by members of Local 702 during the work-to-rule program. In May 1993, a group of employees gathered at their supervisor's office to protest the suspension of two employees for failing

Having concluded that the Unions' work-to-rule activities were NLRA §7-protected, concerted activities, and that CIPS instituted the lockout as a "reprisal" for those activities, the ALJ then applied the test articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 869 (1st Cir. 1981), which applies in "all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." *Id.* at 1083. Under that test, the General Counsel must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.*

Applying the *Wright Line* test to his findings, the ALJ first concluded that CIPS "locked out the bargaining unit[] employees as an act of discrimination, in order to harm or punish them for engaging in concerted activities." App. 242a. Next, the ALJ—noting that this Court has authorized post-impasse employer lockouts "for the *sole purpose* of bringing economic pressure to bear in support of [an employer's] legitimate bargaining position," *American Ship Building v. NLRB*, 380 U.S. 300, 318 (1965) (emphasis added)—found that CIPS failed to meet its *Wright Line* burden to justify its decision as turning on non-discriminatory criteria. App. 243a-244a. Consequently, the ALJ found that the lockout was "an act of reprisal to punish the employees for engaging in protected concerted activities and to discourage the employees from engaging in such activities," and concluded

---

to provide certain information on their sick-leave forms—information that the Union believed to be confidential. The dispute was settled informally when CIPS agreed to allow employees to omit the information from their forms. App. 18a.

that the lockout violated NLRA §§ 8(a)(1) and 8(a)(3). App. 244a.[4] CIPS appealed to the Board.

3. The Board's Decision

In a two-to-one decision, the Board reversed the ALJ's determination that CIPS' lockout was an unfair labor practice.

The Board first rejected the ALJ's legal conclusion that the lockout here—instituted in reprisal for the bargaining unit employees' NLRA § 7-protected, concerted activities and with the intention of harming and punishing the employees for engaging in these activities—constituted §§ 8(a)(1) and 8(a)(3) discrimination. In so doing, the Board accepted both the ALJ's credibility determinations and the ALJ's finding that the lockout was in reprisal for the Unions' work-to-rule program and the bargaining-unit employees' participation therein. The Board also proceeded on the premise that the work-to-rule program was § 7-protected, concerted activity. App. 21a. Nonetheless, the majority concluded that even if "the *sole objective* of the lockout was to force the Unions to cease" their protected, concerted activities, this motivation "was "not an impermissible business objective." App. 25a (emphasis added).

Citing this Court's general observation in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965), that the "right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage," the Board reasoned that because the Unions' protected, concerted activities were instituted in support of the Unions'

---

[4] Having found that CIPS' motivation for the lockout was impermissible according to the *Wright Line* analysis, the ALJ stated that there was no need to assess whether the lockout was unlawful under the "inherently destructive" test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), though the ALJ did opine that the lockout would be unlawful under that test as well.

bargaining position, CIPS was privileged to lock out all bargaining-unit employees. App. 25a. "Simply put," the Board summed up, "an employer is and 'should be free to exert any force that has as its only effect compelling the union to yield in a current dispute,' and if forcing the Unions to end their inside game in support of their bargaining position was the [employer's] only purpose, it constituted a legitimate and substantial business justification for the lockout." App. 26a (quoting Note, "Lockouts—Employers' Lockouts with Temporary Replacements is an Unfair Labor Practice," 85 Harv. L. Rev. 680, 686 (1972)).

In addition, as a second ground for reversing the ALJ's decision, the Board rejected the ALJ's finding that the *only* objective of the lockout was to force the employees to cease their protected, concerted activities. Rather, the Board concluded on the basis of the May 20, 1993 letters that the lockout was intended not only to force the Unions to end their concerted activities, but also to support CIPS' bargaining position. App. 28a.

The dissenting opinion took issue with the Board's primary legal holding—*viz.*, "that an employer may lawfully lock out employees to pressure them to abandon" concerted, protected activity, App. 43a—as contrary to basic principles of NLRA anti-discrimination law. "While the parties generally have their choice of economic weapons," the dissent explained, "this choice is not unrestricted":

> The pressure exerted may not be directed toward inhibiting the exercise of section 7 rights, and a lockout prompted by an antiunion motive is plainly illegal. Simply because the Respondent used an economic weapon to counterattack an economic weapon used by the Unions in support of their bargaining demands, does not mean, as our colleagues hold today, that the Respondent's use of that weapon was legitimate. [App. 56a.]

The dissent went on to note that while the Board and the courts have construed the NLRA as permitting bargaining lockouts in certain clearly delineated circumstances, no prior decision has "endorsed the proposition endorsed by . . . the majority, that the goal of forcing employees to cease engaging in protected activities in support of a union is a legitimate and substantial business objective." App. 57a.

Finally, the dissent described the impact of the Board's holding in the following terms:

> [T]he majority would allow an employer to respond to any protected activities in support of a union's bargaining position by locking out its employees, whether or not the employer had a specific legitimate business justification, simply because there was an ongoing bargaining dispute. Thus, for example, if employees held regular rallies outside the plant on their spare time, in support of the Union's bargaining demands, and if the majority means what it says, the employer would be permitted to lock out the employees to pressure them to halt the rallies. I can therefore envision that the lockout, which will (given the universality of no strike/no lockout pledges) generally occur during negotiations, might too easily become a device disguised as an effort to protect the employer's bargaining position, for breaking a union. [App. 62a n.24.]

4. The D.C. Circuit's Opinion

On the Unions' timely petitions for review, the D.C. Circuit affirmed the Board's decision.

At the outset, the Court of Appeals addressed "[t]he first objective the Board attributed to CIPS," which, that court agreed, was "'to force the Unions to cease their inside game activities,'" App.8a (quoting 326 NLRB No. 80, slip op. at 4 (App. 25a). The court below upheld the Board's legal conclusion that this is a lawful objective on the ground that the lockout "was a legitimate defense against" the work-to-rule

activities that the Unions "deployed as part of 'economic warfare in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts.'" App. 8a (quoting 326 NLRB No. 80, slip op. at 4 (App. 25a)).

The Court of Appeals, moreover, agreed with the Board majority that the protected status of the Union activity here "does not insulate it from counteraction by an employer." App. 11a. In this regard, the court below read *American Ship Building Co. v. NLRB*, *supra*, and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), as sanctioning lockouts in response to protected strike activity and opined that there is "no reason to treat differently the lockout here which was implemented in response to the inside game strategy that the Unions adopted as an alternative to a strike," App. 11a.[5] In so doing, the D.C. Circuit approved a newly-crafted "economic defense justification," *id.*, for employer lockouts.[6]

---

[5] In reaching this conclusion, the court below rejected the Unions' argument that the Board's decision here is inconsistent with two prior Board decisions—*Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), and *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973)—holding that employer lockouts of employees because they engaged in protected, concerted activities violate NLRA §§ 8(a)(1) and 8(a)(3). The court below treated these cases as inapposite because CIPS locked out *all* of the bargaining-unit employees, not just the specific employees who engaged in the protected activity, as in *Riverside* and *Thrift Drug*. App. 11a-12a. Thus, on the narrowest reading of the opinion, the Court of Appeals approved adverse employment action intended to interfere with protected activities as long as the adverse action indiscriminately reaches all bargaining-unit employees rather than targeting only those who engaged in the protected activity.

[6] We note, for the sake of completeness, that the Court of Appeals went on to affirm the Board with respect to CIPS' "second business objective"—that is, the Board's finding that the lockout was also intended to support the employer's bargaining position—concluding that this objective "was a legitimate one and supported by the evidence." App. 9a.

While we disagree that the Board's finding of this second "motive" or "objective" has any evidentiary support, we do not challenge the Board's ruling in this regard or the Court of Appeals' affirmance thereof. First of

REASONS FOR GRANTING THE WRIT

In this case, a divided National Labor Relations Board, affirmed by the D.C. Circuit, essayed a radical break in the National Labor Relations Act law by legitimizing lockouts in reprisal for NLRA § 7-protected, concerted activity.

By so doing, the decision below works a qualitative expansion in the NLRA lockout privilege as delineated in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965)—this Court's seminal bargaining lockout decisions—and a corresponding radical diminution in the most basic, and well-settled, NLRA anti-discrimination principles.

Given the force of the employer lockout and the importance of the NLRA's legal protections for § 7 activity in realizing the Act's aims, this is a change in the law of the most profound consequence.

Not surprisingly, then, the decision below is contrary to the long line of Board and court authority holding that employer reprisals against employee NLRA § 7-protected, concerted

---

all, of course, this Court does not sit to resolve evidentiary disputes. Second, putting aside that evidentiary question, the conclusion that a true employer bargaining lockout is lawful is consistent with this Court's *American Ship* and *Brown Food* decisions and does not present an independent basis for this Court's review. And, third, the Board's holding in this regard and the Court of Appeals' affirmance thereof is of no legal relevance to the question raised by the Board's primary holding. Under well-settled principles of NLRA § 8(a)(3) anti-discrimination law, an adverse employer action motivated by an unlawful objective is not rendered lawful by the concomitant presence of a lawful objective. Thus, if we are correct that, contrary to the Board's first holding, a retaliatory lockout to harm and punish employees for engaging in protected, concerted activity is NLRA § 8(a)(3) discrimination, the lockout here, which the ALJ, the Board, and the Court of Appeals all found was so motivated was unlawful. This is so even crediting the Board's second finding that the lockout was also animated by a second legitimate motive.

activity are a § 8(a)(3) unfair labor practice. And, the talismanic use of the terms "lockout" and "economic weapon" to describe the employer reprisal sanctioned here does nothing to distinguish those § 8(a)(3) decisions or to justify the different result reached in this case. Equally contrary to the decision below, nothing in this Court's bargaining-lockout decisions provides any basis—or any support—for the ruling here. To the extent that the Board and the Court of Appeals did not proceed in resolute disregard of the NLRA anti-discrimination principles, both proceeded on a plain misreading of this Court's lockout decisions.

The reprisal-lockout question of first impression presented here, like its bargaining-lockout predecessors in this Court, is a particularly complex question that goes to the Act's very essence.

The employer lockout occupies a point at which two NLRA regimes meet, and the legal status of a lockout turns on a proper understanding of both regimes and the role each plays in the national labor policy as a whole. The Act, first of all, grants employees the right to engage in concerted union activity and protects that right by prohibiting retaliatory adverse employer actions; and, of equal moment, the Act establishes a system of free collective bargaining "that look[s] to the ordering of the parties' industrial relationship through the formation of a contract," a process that recognizes "the availability of economic pressure devices to each to make the other party incline to agree on one's terms," *NLRB v. Insurance Agents*, 361 U.S. 477, 485, 489 (1960).

As *American Ship* and *Brown Food* show, granting the NLRA §§ 7 and 8(a) employee-protection regime an overly broad reach undermines the free-collective-bargaining regime. As this case shows, it is equally true that granting the free-collective-bargaining regime an overly broad reach undermines the §§ 7 and 8(a) employee-protection regime. And, as *American Ship* and *Brown Food* also show, the

complexities involved in placing the lockout in its proper place in these regimes have proved sufficiently daunting as to require this Court's intervention to maintain the integrity of the statutory scheme.

Thus, in *American Ship* and *Brown Food*, while the Board had given primacy to the §§ 7, 8(a) employee-protection regime by invalidating the bargaining lockout, this Court recognized the primacy in that context of the NLRA free-collective-bargaining regime and on that basis, the legitimacy of the bargaining lockout as an employer economic weapon for securing a collective bargaining agreement on economic terms favorable to the employer.

Here again the Board has gotten things wrong, this time with regard to employee lockouts in reprisal against employee § 7-protected concerted activity. What is more, the Board, and the Court of Appeals in affirming the Board, have gotten things wrong by misreading this Court's *American Ship* and *Brown Food* decisions to go beyond validating bargaining lockouts and to validate both lockouts "responsive" to protected strike activities and lockouts "in reprisal for" other protected *non-strike* activities.

But such a general lockout privilege exception to the NLRA §§ 8(a)(1) and (3) prohibition on employer reprisals against § 7-protected, concerted activity has no base in *American Ship* or *Brown Food* or in the free-collective-bargaining regime and cannot be justified by reference to that regime, its policy, or its purposes. And, the Board's sanctioning of reprisal lockouts is directly contrary to the foundational NLRA principle that adverse employer action against employees for engaging in § 7-protected concerted activity is a *core* employer unfair labor practice. That principle is foundational in the sense that § 7 *rights* and the Act's protection of those *rights* form the predicate for, and set

the limit on, the free-collective-bargaining regime. *See* 29 U.S.C. §§ 151, 157.

The decision below, by overriding that limit, distorts both the Act's protection of employee § 7 rights and the Act's preference for free collective bargaining as a means of mediating conflicting employer and employee *economic interests*, which presupposes those rights and their protection.

By reason of the Act's enforcement scheme, unless *certiorari* is granted here the Board's first words privileging employer reprisal lockouts will be the authoritative last words heard, beyond challenge in any forum, on the legality of such lockouts. That being so—and given the nature and magnitude of the Board's error, its destructive impact on NLRA § 7 rights and on the exercise of those rights and its equally destructive impact on the structure of the NLRA legislative scheme—this reprisal-lockout case, like its predecessor bargaining-lockout cases, urgently calls for this Court's review.

1. The Decision Below Violates Basic NLRA Anti-Discrimination Principles

A. "The central purpose" of the anti-discrimination regime established by NLRA §§ 7, 8(a)(1), and 8(a)(3) is "to protect employee self-organization and the process of collective bargaining from disruptive interference by employers." *American Ship*, 380 U.S. at 317.

It is well-settled that retaliation against employees for their exercise of § 7 rights is an unlawful motive that lies at the very core of the NLRA anti-discrimination law. As this Court has stressed, the Act "makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983); *see also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) ("Under § 8 (a) (3), it is unlawful for an employer by discrimination in terms of employment to

discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities").

And, it is equally well settled that adverse employer action based on an improper motive—*viz.*, to retaliate against employees for protected, concerted activity—is a § 8(a)(3) unfair labor practice even though the same employer action for a proper motive is entirely lawful. "Where there is direct evidence of an employer's antiunion motive, the Court has recognized that otherwise legitimate actions may constitute unfair labor practices." *Metropolitan Edison*, 460 U.S. at 701, citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).[7]

All this being so, a long and unbroken line of Board and court precedents firmly establish that an employer commits an unfair labor practice by retaliating against employees—through a wide variety of adverse employer actions—for engaging in § 7-protected union activities. *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999)(employer who contracted out security work in reprisal for strike by security workers violated §§ 8(a)(1) and 8(a)(3)); *Molon Motor and Coil Corp. v. NLRB*, 965 F.2d 523, 526 (7th Cir. 1992) (discharge of employee for engaging in protected work stoppage is an unfair labor practice); *Teamsters v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988) ("[A]n employer violates section 8(a)(3) of the Act when, in retaliation for employees' union activities, it lays off or discharges employees."); *Packerland Printing Co. v. NLRB*, 494 F.2d 293 (7th Cir 1974) (per curiam) (transferring of employees for engaging in protected activities unlawful);

---

[7] To be sure, as a defense, an employer may offer a lawful reason for the adverse action, but once an unlawful motivation has been shown, the employer then has the burden of proving that it would have taken the same adverse action even in the absence of the prohibited motivation. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403-04 (1983).

NLRB v. Zelrich Co., 344 F.2d 1011, 1014 (5th Cir. 1965) (withholding of Christmas bonuses from all employees in retaliation for the employees' majority vote for union representation is an unfair labor practice).

The adverse employer action here—a bargaining-unit-wide lockout—is a particularly pointed reprisal against protected, concerted activities. Its very point, as the Board and the court below recognized, was to coerce the employees to agree to cease engaging in the very § 7 activities the Act is designed to protect. Thus, as a matter of reason, the lockout is the last form of retaliatory adverse employer action that the Act would be expected to countenance. And, indeed, the Board has—until now—consistently held that employer lockouts in reprisal for employees' concerted, protected activities does violate §§ 8(a)(1) and 8(a)(3).

In *Highland Superstores*, 314 N.L.R.B. 146 (1994), for example, the Board concluded that an employer engaged in NLRA-prohibited discrimination by responding to protected, concerted employee action during bargaining—namely, handbilling in support of a consumer boycott—by locking out its employees "to punish the employees for their handbilling." Significantly, the Board reached this conclusion while acknowledging that the employees' protected activity constituted employee "economic action":

> In our view, an employer can ordinarily take economic action in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position. In the instant case, the Respondent locked out its employees . . . in response to the economic action of the Union (handbilling in support of a consumer boycott). However, we are persuaded that the Respondent acted to punish the employees for their handbilling, rather than in support of its bargaining position. [*Id.* at 146.]

Similarly, in *Riverside Cement Co.*, 296 N.L.R.B. 840, 842 (1989), the Board held that an employer engaged in prohibited discrimination when it locked out employees "in retaliation for the protected concerted activity engaged in by the employees."[8]

And, in *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973), *enforced*, 491 F.2d 751 (3d Cir. 1974), the Board held that the employer violated the Act by laying off an employee for picketing in support of the union's bargaining position and conditioning the employee's return on a cessation of this picketing. The layoff was unlawful, the Board held, because its "primary object was the protection of the employer against the Union's economic weapons rather than the placing of an economic burden on the union members in support of the employer's contract position" even though the lockout was "secondarily supportive of the Employer's economic contractual position." *Id.* at 43.

As *Highland Superstores*, *Riverside Cement*, and *Thrift Drug* make clear, prior to its decision below, the Board had consistently understood the NLRA anti-discrimination law to prohibit employer lockouts instituted in reprisal for employees' engaging in § 7-protected, concerted activities.

B. Applying these basic NLRA anti-discrimination principles to this case, it is clear that CIPS' motivation for the

---

[8] In that case, after the contract had expired and the negotiations had reached an impasse, the employer implemented its final offer, which included the continuation of a contract provision requiring employees to provide some "personal tools" but specifically exempting others. The employees then engaged in a concerted refusal to provide the contractually exempted tools, and the employer responded by instituting a lockout. The Board concluded that the supplying of these tools was voluntary, and that the refusal to supply these tools voluntarily was protected, concerted activity. Consequently, the Board held, the lockout violated §§ 8(a)(1) and 8(a)(3) because it was instituted "in response to the employees' decision through the Union to invoke the terms of the implemented proposal." 296 N.L.R.B. at 842.

lockout—to "harm or punish" the employees for engaging in concerted activities, App. 242a—is an NLRA §§ 8(a)(1) and 8(a)(3) unfair labor practice. Indeed, this is a case in which the credited, direct evidence establishes that the employer was motivated by a desire to retaliate for the employees' protected, concerted activities.[9]

Thus, the decision of the Board and the court below not only flies in the face of the most basic NLRA anti-discrimination principles, but it also reverses the course the Board charted in *Thrift Drug* and followed for nearly two decades with respect to the lockout in retaliation for § 7-protected, concerted activity, the precise employer action at issue here.

Notwithstanding this stark departure from settled anti-discrimination principles in general and the Board's consistent application of those principles in lockout cases in particular, neither the Board nor the court below acknowledged this sea change in the Board's reading of §§ 8(a)(1) and 8(a)(3), much less "adequately explained its departure from prior norms." *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954). Rather, the Board declared, by way of an extended footnote, that its prior reprisal-lockout precedents were "distinguishable," App. 33a n.20, and the Court of Appeals either accepted the Board's

---

[9] Although the Board found that CIPS had an additional, proper motivation, there was no showing—and no finding—that CIPS would have instituted the lockout in the absence of the protected activity engaged in here. The Board's second holding, therefore, cannot salvage its decision that CIPS' retaliatory adverse action against its employees for exercising their § 7 rights was lawful. "Even if the lockout is motivated in part by the wish to exert economic pressure for the lawful purpose of supporting a legitimate bargaining position, the lockout is nevertheless unlawful if it is also motivated by an intent to interfere with" protected, concerted activity. *Movers and Warehousemen's Ass'n of D.C. v. NLRB*, 550 F.2d 962, 966 (4th Cir. 1977).

"distinctions" or offered "distinctions" of its own, see App. 12a. To say that these distinctions are a micron thin is perhaps generous in the extreme.

First, the Board distinguished its recent, and fully on-point, decision in *Highland Superstores* on the ground that the employer there not only locked out the employees to retaliate against their protected handbilling, but had also threatened to discharge the employees before so doing. App. 33a n.20.[10] That is not a distinction so much as a tacit acknowledgement that there is no distinction. For there is no legal rule that an employer who takes adverse employment action for an impermissible motive escapes § 8(a)(3) liability by not committing the prior independent § 8(a)(1) violation of threatening its employees with discrimination. At all events, the Board's decision in *Highland Superstores* that the employer violated § 8(a)(3) rested not on the earlier threat *per se*, but on the record evidence as a whole (including the pre-lockout threat) demonstrating that the employer locked out the employees "to punish the employees for their handbilling." 314 N.L.R.B. at 146. That much is clear in this case from the undisputed contemporaneous evidence concerning the lockout, its purpose, and its motivation.

In addition, the Board pushed *Riverside Cement* to the side by declaring that a violation was found in that case because the employer's implementation of a rule requiring employees to furnish their own tools constituted a unilateral change in change in their employees' terms of employment, which rendered the employer's bargaining position illegitimate.

---

[10] In that case, the Board found the threat to be an independent § 8(a)(1) violation. With respect to the § 8(a)(3) violation, the Board also cited the pre-lockout threat as evidence of the employer's improper motivation. *See id.*; *see also* App. 59a n.20 (Member Liebman, dissenting). Nowhere in its decision does the Board remotely suggest that the pre-lockout threat was the *sine qua non* for its finding of unlawful discrimination.

App. 33a n.20. But, as Member Liebman's dissenting opinion pointed out, the *Riverside Cement* decision was not based on this ground—indeed nothing in this regard is to be found in that decision at all. *See Riverside Cement*, 296 N.L.R.B. 840-42; App. 59a n.20. Rather, as noted above, the Board in *Riverside Cement* concluded that the lockout violated §§ 8(a)(1) and 8(a)(3) because, by instituting the lockout, "the [employer] engaged in retaliation for the protected concerted activities engaged in by the employees." 296 N.L.R.B. at 842.

And finally, for its part, the Court of Appeals added its own distinctions of *Riverside Cement* as well as *Thrift Drug*. According to the Court of Appeals, those cases are inapposite because "[i]n contrast to *Riverside* and *Thrift Drug*, the lockout here was directed unit-wide, not to specific employees engaged in specific acts." App. 12a. This explains nothing and justifies nothing. It is well settled, both within and without the D.C. Circuit, that an employer does not escape liability for retaliatory action by punishing all employees uniformly for the § 7 concerted activity of some of their number. As the Second Circuit put the matter, "A power display in the form of a mass lay-off, where it is demonstrated that a significant motive and desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of § 8(a)(3) to the letter even if some white sheep suffer along with the black." *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964).[11]

---

[11] *See also, e.g., Allied Industrial Workers v. NLRB*, 476 F.2d 858, 877 (D.C. Cir. 1973) ("A practice applied uniformly to all employees may be discriminatory and violate the Act . . . ."); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175 (6th Cir. 1985) ("[G]eneral retaliation by an employer against the workforce can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters."); *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1016 (5th Cir. 1978) ("Where the central aim of a mass

2. This Court's Bargaining Lockout Jurisprudence Does Not Authorize Lockouts in Reprisal for Protected, Concerted Activity

The Board and the Court of Appeals dispatched the NLRA § 7 rights at stake here and their §§ 8(a)(1) and (3) safeguards with what both treated as a deft but telling doctrinal *coup de grâce*: that this Court's *bargaining lockout* decisions create a general lockout exception to the otherwise-applicable NLRA anti-discrimination principles. In the final analysis, the decision below rests on reading this Court's *American Ship* and *Brown Food* decisions to sanction the lockout as a response to protected *strike* activity and, by an extension of their rationale, as further authorizing the lockout as "a legitimate defens[ive]" response to other protected, concerted *non-strike* activities. App. 8a.

That is to seriously misread *American Ship* and *Brown Food*. Those decisions recognize a carefully defined employer privilege to lock out employees for the purpose of supporting the employer's bargaining position. That privilege finds its source in the NLRA free-collective-bargaining regime, which presupposes "the availability of economic pressure devices to each to make the other party incline to agree on one's terms." *Insurance Agents*, 361 U.S. at 489. Nothing in *American Ship* and *Brown Food* or in their rationale sanction an employer lockout in retaliation for protected, concerted activities and with the intention of forcing the employees to cease those activities.

A. In *American Ship*, the Board determined that even in the absence of any evidence of improper motive, a bargaining lockout is an unfair labor practice. This Court reversed, holding "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after an impasse has been reached, he temporarily shuts down his plant and lays off his employees *for the sole*

---

lay-off is to discourage union activity, the discharge is unlawful, even though neutral or anti-union employees suffer in the process.").

purpose of bringing pressure to bear in support of his bargaining position" 380 U.S. at 318 (emphasis added). In so doing, the Court was at pains to note, "[w]hat we are here concerned with is the use of a temporary layoff of employees *solely* as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached," and to add, "[t]his is the only issue before us, and all that we decide." *Id.* at 308 (emphasis added).

American Ship thus did not concern—as this case surely does—a lockout that is motivated by a desire to retaliate for protected, concerted activity and that has as its object forcing the employees to end that activity. Rather, the *American Ship* Court stressed that "[t]here was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so." 380 U.S. at 308-09.

Against all this, the Board and the court below both quoted in isolation *American Ship*'s statement that "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage," and insisted that this general statement was dispositive of the issue. App. 11a, 25a. In context, this statement does not support the decisions below at all. The *American Ship* passage in question addresses the Board's argument there that a lockout, in and of itself and without evidence of improper motive, is an unfair labor practice, and reads as follows:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. *Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and*

> *the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.* [*Id.* at 308-09 (emphasis added).]

To continue with that thought, a lockout in reprisal for employees' protected, concerted activities is the paradigm of an "unlawful" lockout motivated by "hostility to the process of collective bargaining," which process, of course, contemplates as an integral feature the exercise of the rights to concerted activity vouchsafed by § 7. *See* 29 U.S.C. §§ 151, 157.

B. The decision below is no more justified by this Court's decision in *Brown Food*, the companion case to *American Ship*. *Brown Food*, unlike *American Ship*, did arise in the context of a strike, and added to *American Ship* by holding that, where employees engaged in a "whipsaw strike" against various members of a multiemployer bargaining unit, a non-struck employer does not violate NLRA §§ 8(a)(1) and 8(a)(3) by locking out its employees and hiring temporary replacements "simply . . . to bring pressure to bear in support of his bargaining position after impasse in bargaining negotiations has been reached." 380 U.S. at 284.[12]

At the same time, the *Brown Food* decision was fully as emphatic as the *American Ship* decision in disclaiming any limitation upon the recognized understanding of the NLRA anti-discrimination principle. The *Brown Food* Court took pains to stress that there was no "independent evidence that the [employer] acted either out of hostility toward the Local

---

[12] We note in passing that the court below incorrectly asserted that *American Ship* involved a strike. *See* App. 11a ("The strikes in both *American Ship Bldg.* and *Brown*, as the Board noted, were also protected activities—yet the employers' responsive lockouts in those cases were upheld by the Supreme Court."). In fact, there was no strike in *American Ship*—indeed, the gist of the union's complaint there was that the lockout burdened its right to strike by leaving the employees "nothing to strike against." 380 U.S. at 310.

or in reprisal for the whipsaw strike." *Id.* at 282 (emphasis added). Rather, the Board (as it had also done in *American Ship*) had determined that antiunion animus could be inferred from the employer action itself, without any need for a specific finding of improper motivation such as an act "in reprisal for" protected, concerted activity. *Id.* at 282. And, in correcting the Board on this point, this Court, far from diluting the anti-discrimination principle, reaffirmed the basic point that employer actions that are legitimate in the absence of a prohibited motive are illegitimate when instituted with an improper motive: The *Brown Food* Court underscored the point that "Congress clearly intended the employer's purpose in discriminating to be controlling" and that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." *Id.* at 287, 288.

Here, the Court of Appeals, following the Board's lead, misread *Brown Food* as having authorized the lockout on the ground that the lockout was "responsive" to the whipsaw strike; and, from this premise concluded that there was "no reason to treat differently the lockout here," which that court recognized "was implemented 'in reprisal' for the inside game." App. 11a-12a. The Court of Appeals' premise could not be more wrong and the conclusion that court drew falls with its premise. The *Brown Food* Court did *not* sanction lockouts "responsive" to whipsaw strikes. To the contrary, the Court expressly distinguished a lawful bargaining lockout from a lockout "*in reprisal for the whipsaw strike*," 380 U.S. at 282 (emphasis added).

C. Contrary to the Board's and the Court of Appeals' joint supposition then, *American Ship* and *Brown Foods*, read singly and read together, do *not* stand for the proposition that employers are privileged to lock out employees in reprisal for NLRA § 7-protected, concerted activity and in order to force the employees to cease that protected, concerted activity. To the contrary, *American Ship* and *Brown Food*—while

recognizing that the NLRA's free-collective-bargaining regime contemplates that employers, no less than employees, may use economic pressure in support for their bargaining positions—reaffirm the core protection against purposeful antiunion discrimination that §§ 8(a)(1) and 8(a)(3) prohibit. Neither *American Ship* nor *Brown Food* created any broad general lockout exception to the basic NLRA §§ 8(a)(1) and 8(a)(3) anti-discrimination principles.

The decision below thus "rest[s] on an 'erroneous legal foundation'" that only this Court can correct, and so long as that decision stands it "frustrates the congressional policy underlying [the NLRA]." *Brown Food*, 380 U.S. at 291-92.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.,
Suite 1000
Washington, D.C. 20005
(202) 842-2600

(2)

Supreme Court, U.S.
FILED

No. ——

00-350 SEP 6 2000

IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

LOCAL UNION 148, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.,
Suite 1000
Washington, D.C. 20005
(202) 842-2600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

26498

TABLE OF CONTENTS

Page

Appendix A: Opinion of the Court of Appeals for the District of Columbia Circuit in *Local 702, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. NLRB*, Nos. 99-1137/99-1139 (May 9, 2000) 1a

Appendix B: Decision and Order of the National Labor Relations Board in *Central Illinois Public Services Company*, 326 N.L.R.B. No. 80 (Aug. 27, 1998) 15a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1137

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Intervenor

No. 99-1139

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 148, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Intervenor

On Petitions for Review of an Order of the
National Labor Relations Board

May 9, 2000

Before: HENDERSON, RANDOLPH and GARLAND, *Circuit Judges*.

KAREN LECRAFT HENDERSON, *Circuit Judge*:

Local 702 and Local 148 of the International Brotherhood of Electrical Workers, AFL-CIO (collectively Unions) challenge a decision of the National Labor Relations Board (NLRB, Board) holding that the Central Illinois Public Service Company (CIPS) did not commit an unfair labor practice when it locked out its employees during contract negotiations. *CIPS*, 326 N.L.R.B. No. 89, 1998 WL 600788 (Aug. 27, 1988). Reversing the decision of the administrative law judge (ALJ), the Board found that the lockout, implemented in response to the Unions' "inside game" tactics, was not "inherently destructive of employee rights," was justified by legitimate business interests and was not motivated by anti-union animus. Because we conclude the Board's decision is in accord with the law and supported by substantial evidence, we deny the Unions' petitions for review.

I.

In April 1992 CIPS, a public utility which generates and distributes electricity and gas in Illinois, began negotiating with each of the Unions over contracts to succeed those expiring in June 1992. When no agreement was reached by March 1993 CIPS submitted a "final" offer to each of the Unions, which each voted to reject. In lieu of striking, the Unions decided to institute an "inside game" strategy under which their members agreed to refuse to work voluntary overtime and generally to "work-to-rule" (*e.g.*, "adhering strictly to all company safety and other rules; doing exactly and only what they were told; reporting to work precisely on time and parking work trucks at company facilities at day's end (thus precluding employees from responding to after-hours emergencies); presenting all grievances as a group; advising

non-employees to report unsafe conditions; and advising customers of their right to various company information and of their right to have their meters checked annually for accuracy," *CIPS*, slip op. at 1, 1998 WL 600788, at *1). The Unions began the inside game strategy on April 24, 1993 and continued to negotiate while carrying it out. At 4:00 a.m. on May 20, 1993 CIPS instituted a lockout of all members of the two locals. Negotiations continued during the lockout and CIPS reached an agreement with Local 148 in June, thereby ending the lockout of its members. Local 148 nonetheless remained off the job in support of Local 702. CIPS ended the lockout of Local 702 on August 25, 1993, although no contract agreement was reached until January 1994.

Each of the Unions filed unfair labor practice charges with the NLRB, alleging violations of section 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), (5). Following a hearing the ALJ judge issued a decision dated May 20, 1996, which found that CIPS had violated all three cited subsections. In relevant part, the ALJ's decision concluded that the work-to-rule campaign constituted protected activity for which the lockout was intended as punishment in violation of section 8(a)(3). In a 2-1 decision dated August 27, 1998 the Board reversed the ALJ on the section 8(a)(3) lockout charge, concluding the lockout was instituted not out of anti-union animus but with the dual "legitimate and substantial" business justifications of facilitating contract negotiations and of countering the economic effects of the inside game strategy. *See CIPS*, slip op. at 4-7, 1998 WL 600788, at *6-10.

II.

The Unions challenge both the Board's interpretation of the law and its factual findings. "The courts accord a very high degree of deference to administrative adjudications by the NLRB." *United Steelworkers Local 14534 v. NLRB*, 983 F.2d

240, 244 (D.C. Cir. 1993). "The Board has primary responsibility for applying the general provisions of the [National Labor Relations Act], and where its interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices." *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1428 (D.C. Cir. 1989) (citing *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95 (1985); *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983)). "[W]ith respect to questions of fact," "the findings of the Board . . . if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). "Where the Board has disagreed with the ALJ, as occurred here, the standard of review with respect to the substantiality of the evidence does not change." *United Food & Commercial Workers v. NLRB*, 768 F.2d 1463, 1469-70 (D.C. Cir. 1985) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *General Teamsters Local Union No. 174 v. NLRB*, 723 F.2d 966, 971 (D.C. Cir. 1983)). Nevertheless, "cases have made clear that '[t]he findings and decision of the [ALJ] form an important part of the "record" on which [the] judgment of substantiality is to be based,' *International Brotherhood of Teamsters, Local No. 310 v. NLRB*, 587 F.2d 1176, 1180 (D.C. Cir. 1978), and that the Board, when it disagrees with the ALJ, 'must make clear the basis of its disagreement . . .' *General Teamsters*, *supra*, 723 F.2d at 971." *Id.* at 1470 (alteration in original). In the end, however, "[s]ince the Board is the agency entrusted by Congress with the responsibility for making findings under the statute, 'it is not precluded from reaching a result contrary to that of the [ALJ] when there is substantial evidence in support of each result,' " and " 'is free to substitute its judgment for the [ALJ]'s.' " *Carpenters Local 33 v. NLRB*, 873 F.2d 316, 319 (D.C. Cir. 1989) (quoting *Sign & Pictorial U., Local 1175 v. NLRB*, 419 F.2d 726, 734 (D.C. Cir. 1969)

(alteration in original)). Because we conclude the Board's decision here was supported by substantial evidence and its disagreement with the ALJ fully explained, we do not disturb it.

Section 8(a)(3) of the National Labor Relations Act provides in relevant part: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ." 29 U.S.C. § 158(a)(3). In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the United States Supreme Court construed its precedent to establish a comprehensive framework for analyzing allegations of a section 8(a)(3) violation:

> The statutory language 'discrimination * * * to * * * discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. *American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 85 S.Ct. 955 (1965). It was upon the motivation element that the Court of Appeals based its decision not to grant enforcement, and it is to that element which we now turn. In three recent opinions we considered employer motivation in the context of asserted § 8(a)(3) violations. *American Ship Building Co. v. National Labor Relations Board, supra*; *National Labor Relations Board v. Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); and *National Labor Relations Board v. Erie Resistor Corp.*, [373 U.S. 221, 227, 83 S.Ct. 1139, 1144-45, 10 L.Ed.2d 308 (1963)]. We noted in *Erie Resistor, supra*, 373 U.S. at 227, 83 S.Ct. at 1144, that proof of an antiunion motivation may make unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so 'inherently destructive of employee interests' that it

> may be deemed proscribed without need for proof of an underlying improper motive. *National Labor Relations Board v. Brown*, *supra*, 380 U.S., at 287, 85 S.Ct. at 986, *American Ship Building Co. v. National Labor Relations Board*, supra, 380 U.S. at 311, 85 S.Ct. at 963. That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.' *National Labor Relations Board v. Erie Resistor Corp.*, *supra*, at 228, 231, 83 S.Ct. at 1145-1147. If the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing 'his actions as something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.' *Id.*, at 228, 83 S.Ct. at 1145. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Id.*, at 229, 83 S.Ct. at 1145. On the other hand, when 'the resulting harm to employee rights is * * * comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful,' and an affirmative showing of improper motivation must be made. *National Labor Relations Board v. Brown*, supra, 380 U.S. at 289, 85 S.Ct. at 987; *American Ship Building Co. v. National Labor Relations Board*, *supra*, 380 U.S. at 311-313, 85 S.Ct. at 963-964.

388 U.S. at 33-34. Applying this framework, the Board found that the CIPS lockout did not violate section 8(a)(3).

The Board first concluded that "the lockout in the instant case, standing alone, cannot be considered inherently destruc-

tive of employee rights," based on the Supreme Court's holding in *American Ship Bldg.* that "a lockout for the purpose of applying pressure on a union during a bargaining dispute is not 'one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation.' " *CIPS*, slip op. at 3, 1998 WL 600788, at *4 (quoting *American Ship Bldg.*, 380 U.S. at 309); *see also* slip op. at 3, 1998 WL 600788, at *4 (noting even in *Brown*, where employer took "additional step of hiring temporary replacements after the lockout to continue operations," Supreme Court "found that such conduct is not inherently destructive of employee rights"). The Board therefore determined "to treat [the lockout] as having a 'comparatively slight' impact on employee rights and apply the second *Great Dane* test to determine the lockout's legality." *CIPS*, slip op. at 4, 1998 WL 600788, at *5. We agree with the Board's analysis. The Supreme Court made it clear in *American Ship Bldg.*, as the Board observed, that a lockout "does not fall into that category of cases arising under § 8(a)(3) in which the Board may truncate its inquiry into employer motivation." 380 U.S. at 312.[1] Thus, the Board

---

[1] Local 702 contends the Board was required to "analyz[e] the specific facts in this case," in order to make the "inherently destructive" determination. *See* Local 702 Brief at 39-44. The Supreme Court decisions indicate, however, that an across-the-board lockout "as a means to bring economic pressure to bear in support of the employer's bargaining position," 380 U.S. at 308, is *categorically* not "inherently destructive." *See American Ship Bldg.*, 380 U.S. at 310-12 ("Nor is the lockout one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus. . . . This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's

correctly concluded that under the *Great Dane* framework the Board must inquire "whether the Respondent possessed a legitimate and substantial business justification for the lockout." *CIPS*, slip op. at 4, 1998 WL 600788, at *5. The Board reasonably found that CIPS had two such justifications.

The first objective the Board attributed to CIPS was "to force the Unions to cease their inside game activities." *CIPS*, slip op. at 4, 1998 WL 600788, at *5. Noting that the strike that prompted the lockout in *Brown* was "also an economic bargaining weapon in support of contract demands and no less protected than the inside game that the judge found was protected in this case," the Board concluded that the lockout was a legitimate defense against the Unions' "inside game weapon" deployed as part of "economic warfare in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts." *CIPS*, slip op. at 4, 1998 WL 600788, at *5. Applying the standard of review set forth above, we find the Board's conclusion—that CIPS's defensive use of the lockout here against the Unions' inside game was as justified as the lockout in *Brown* aimed at the employees' economic strike—to be "reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court," *United Food*, 880 F.2d at 1428. Accordingly, we defer to the Board's policy choice. *Id.*

---

conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose. . . . But this lockout does not fall into that category of cases arising under § 8(a)(3) in which the Board may truncate its inquiry into employer motivation."); *Brown*, 380 U.S. at 284. ("[W]e do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights."). Thus, the "specific facts" come into play only in the subsequent inquiries whether the particular lockout has a legitimate business justification and whether it was motivated by anti-union animus.

We also agree that the second business objective the Board identified—"resolution of issues that were dividing the parties in their bargaining negotiations," *CIPS*, slip op. at 4, 1998 WL 600788, at *6—was a legitimate one and supported by the evidence. The Board found as a fact that in implementing the lockout CIPS "sought resolution of issues that were dividing the parties in their bargaining negotiations," *CIPS*, slip op. at 4, 1998 WL 600788, at *6, based on the text of letters CIPS's chief executive officer sent the members of each of the Unions on May 20, 1993, the day the lockout began. The bulk of each letter outlined the contract concessions CIPS made in its final offer and the chronology of negotiations, culminating in the inside game. In addition, the letter to Local 702 members stressed that union negotiators had continually rejected CIPS's urging to place its offers before the membership and was accompanied by an analysis of the differences between the previous contract and CIPS's final offer of a new one.[2] The letters to Local 148 explained the Company's position on the one apparent sticking point in negotiations (the transfer of six union positions to management). Each letter closed with the following language:

> Like you, I am anxious to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date. I sincerely regret the disruption this decision will bring into your lives. My hope is that this aspect of our labor dispute is short-lived.

App. 632-33, 644-48. Given their focus and tenor (concentrating on the course and substance of negotiations and CIPS's eagerness to resolve the contract dispute), we conclude the letters constitute substantial evidence in support of the Board's finding "that a purpose of the lockout was to

---

[2] According to the ALJ, a similar analysis was included with the letters to Local 148 members, *CIPS*, ALJ Dec. 23 [App. 806], but it does not appear in the appendix filed with the court.

affect the outcome of negotiations between the Respondent and the Unions." *CIPS*, slip op. at 5, 1998 WL 600788, at *7. We therefore uphold the Board's consequent determination "that application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business justification for the lockout within the meaning of *Great Dane*." *CIPS*, slip op. at 5, 1998 WL 600788, at *7.

Finally, having found two substantial and legitimate business objectives, the Board undertook the third inquiry of the *Great Dane* framework: asking whether the Unions had made an "affirmative showing of improper motivation," such as through "evidence indicating that the lockout was intended to 'discourage union membership' or that was [sic] used 'in the service of designs inimical to the process of collective bargaining.' " *CIPS*, slip op. at 6, 1998 WL 600788, at *9 (quoting *American Ship Bldg.*, 380 U.S. at 308, 312-313).

The Board reasonably found "that 'not only is there absent in [sic] the record any independent evidence of improper motive, but the record contains positive evidence of the [Respondent's] good faith.' " *CIPS*, slip op. at 7, 1998 WL 600788, at *10 (quoting *Brown*, 380 U.S. at 290). As examples of such evidence, the Board pointed to CIPS's long and stable bargaining relationship with the Unions and its lengthy, good faith attempts to reach a contract here, including its clearly expressed desire in the May 20, 1993 letter to resolve differences and resume business as usual as soon as possible. We conclude the Board's historic and continuing good faith dealing with the Union, combined with the absence of affirmative evidence showing anti-union animus, sufficiently supports the Board's finding here.

Despite the Board's faithful adherence to *Great Dane* and its predecessors and specific factual findings, the Unions challenge the Board's decision on two grounds: (1) precedent precludes the Board's finding that CIPS's use of the lockout as an economic defense to the Unions' economic inside game

weapon was in furtherance of a permissible business interest and (2) the finding of no anti-union animus on CIPS's part is belied by the record. We find neither argument a basis for overturning the Board's determination.

First, the Unions contend the Board's acceptance of the economic defense justification is contrary to Supreme Court precedent which, the Unions maintain, requires finding the lockout unlawful because it was intended to curtail "protected" activity, namely the inside game tactics. As the Board correctly observed, however, that activity may be protected does not insulate it from counteraction by an employer. *CIPS*, slip op. at 4, 1998 WL 600788, at *5 (noting: "To hold that it is not a legitimate business justification for the Respondent to defend against this weapon with a lockout in order to force the Unions to yield, ignores the Court's observation in *American Ship* that the 'right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage.'") (quoting 380 U.S. at 309); *see Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 152-53 (1976) ("[E]ven were the activity presented in the instant case 'protected' activity within the meaning of § 7, economic weapons were available to counter the Union's refusal to work overtime, *e.g.*, a lockout. . . .") (citing *American Ship Bldg.*) (footnote omitted). The strikes in both *American Ship Bldg.* and *Brown*, as the Board noted, were also protected activities-yet the employers' responsive lockouts in those cases were upheld by the Supreme Court. We see no reason to treat differently the lockout here which was implemented in response to the inside game strategy that the Unions adopted as an alternative to a strike.

We also believe the Board's endorsement of the economic defense justification is, contrary to the Unions' insistence, consistent with its own precedent. The Unions rely most heavily here on the Board's decisions in *Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), *Thrift Drug Co*, 204 N.L.R.B.

41 (1973), and *Carlson Roofing*, 245 N.L.R.B. 13 (1979). The Board reasonably distinguished *Riverside* on the ground that the action taken there was *not* in furtherance of "lawful bargaining" but was an attempt to implement "a unilateral change in the employees' contractual terms of employment" by requiring employees to furnish specific personal tools which, under their collective bargaining agreement, they were expressly exempted from furnishing. *CIPS*, slip op. at 6-7 n.20, 1998 WL 600788, at *15 n.20. Any worker who did not provide his own tools was locked out. In finding a section 8(a)(3) violation, the *Riverside* Board stressed that the "denial of work was limited to only those employees who engaged in action they were entitled to take under the contract" and therefore "was not a lawful lockout," which is "generally permissible in anticipation of a strike or in support of an employer's legitimate bargaining position." 296 N.L.R.B. at 841. Similarly, in *Thrift Drug Co.*, the Board found a section 8(a)(3) violation where the employer suspended a single picketing employee solely on the ground the employee "was unlawfully selected for suspension because of her activities on behalf of the Union." 204 N.L.R.B. at 41. In contrast to *Riverside* and *Thrift Drug*, the lockout here was directed unit-wide, not to specific employees engaged in specific acts. Finally, *Carlson Roofing* is inapposite because the Board's finding that the lockout there violated section 8(a)(3) was overturned on review by the Seventh Circuit. *See Carlson Roofing Co. v. NLRB*, 627 F.2d 77, 82 (7th Cir. 1980).

The Unions also argue that the Board ignored the ALJ's credibility determinations and findings regarding the true motive behind the lockout. The Board, however, expressly accepted the ALJ's finding that the lockout was implemented "in reprisal" for the inside game, ALJ Decision at 22, 1998 WL 600788, at *35, *CIPS*, slip op. at 2, 1998 WL 600788, at *2, but then found the motive was "not . . . impermissible," *CIPS*, slip op. at 4, 1998 WL 600788, at *5. The ALJ based

his motive finding on statements by company management that it would have "preferred" and been "better off with" a strike or lockout than with the inside game strategy, under which unit employees "were getting the best of both worlds" by "putting pressure on the Company while still getting their paycheck for the daytime work." ALJ Dec. at 65 [App. 848]. Neither this testimony nor the finding itself is at odds with the Board's finding that CIPS implemented the lockout as an economic response to the inside game, which CIPS viewed as economically injurious. The Board's principal factual dispute with the ALJ was on how to construe the text of the May 20, 1993 letters and the Board decision sufficiently explains its differing, and we believe more defensible, interpretation of the letters' language. *See Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999) ("Board's findings of fact are conclusive if supported by substantial evidence," provided it "make clear the basis of its disagreement" when reversing ALJ) (citing *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991); *United Food & Commercial Workers Int'l Union, Local 152 v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985)).

Finally, Local 128 challenges the Board's finding that its members were locked out in order to obtain a contract on the ground that agreement on a contract with Local 128 (as distinct from Local 702) was imminent. We accept the Board's finding as supported by the facts. The record establishes that Local 128 acted in unison with Local 207 in planning and implementing the inside game and that, even after CIPS terminated the lockout of Local 128, its members stayed away from work in support of Local 702 (as they might well have done *ab initio* if CIPS had not locked them out). It was therefore not unreasonable for CIPS and the Board to treat the two locals as a single bargaining force. In fact, given the unified actions of the two locals, lockout of only one might well have suggested unlawful discrimination

under the Board's decisions in *Riverside* and *Thrift Drug*. *See supra* p. 12.

For the preceding reasons, the Unions' petitions for review are

DENIED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Cases 33-CA-10238, 33-CA-10266, and 33-CA-10449

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

and

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 148, AFL-CIO

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The principal issue in this case[1] is whether the Respondent violated Section 8(a)(3) and (1) by locking out its union-

---

[1] On May 20, 1996, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and Charging Parties filed cross-exceptions and supporting briefs as well as briefs in support of the judge's decision. The Respondent filed an answering brief to the cross-exceptions and the General Counsel and Charging Parties filed answering briefs to the Respondent's exceptions. The Respondent, General Counsel, and Charging Parties filed reply briefs.

represented employees in response to "inside game" tactics implemented by the Unions to pressure the Respondent to reach agreement on terms for successor collective-bargaining contracts. The Board has considered the record in light of the exceptions, cross-exceptions, and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent filed a motion to strike the briefs filed by the General Counsel and Charging Parties in support of the judge's decision on grounds that the briefs improperly contain argument to which the Respondent was not afforded the opportunity to answer. We find the Respondent's motion, which was opposed by the General Counsel and the Charging Parties, lacking in merit. Subsequent to Respondent's filing, the matter sought to be stricken from the briefs was set forth in cross-exceptions which the Respondent addressed in its answering brief. Accordingly, as the Respondent has not shown that it was prejudiced by the submission of the briefs filed in support of the judge's decision, we deny the Respondent's motion.

The General Counsel filed a motion to strike "Appendix A" from the Respondent's answering brief on grounds that it constitutes a document that is unexplained, misleading, and essentially outside the record. The Respondent filed an opposition to the General Counsel's motion. The material set forth in Appendix A to the Respondent's answering brief relates to whether an objective of Local 702 during bargaining negotiations was to secure the Respondent's agreement to a "hot cargo" clause prohibited by Sec. 8(e) of the Act. Whether or not Local 702 sought to obtain the Respondent's agreement to an unlawful 8(e) clause is unnecessary to the resolution of the issues ultimately presented in this case and, therefore, we find it unnecessary to pass on the General Counsel's motion.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188

Background

The Respondent is a public utility which furnishes electricity and natural gas throughout central and southern Illinois. It is divided into three geographically defined divisions and operates five power stations. The Respondent's production, maintenance, and operational employees are separately represented by two unions—Local 702 of the International Brotherhood of Electrical Workers and Local 148 of the International Union of Operating Engineers. Local 148 represents employees at four of the power stations while Local 702 mainly represents the Respondent's "division" employees who work primarily in the field laying and repairing gas and electrical lines.

In April 1992, the Unions commenced separate negotiations with the Respondent for new bargaining agreements to succeed those which were due to expire in June 1992. By July 1992 the Respondent and Local 702 reached tentative agreement on a successor contract, only to see it unravel several months later over mutual misunderstandings regarding shared costs of medical insurance premium payments. The two parties resumed negotiations in January 1993.[5] Meanwhile, negotiations between the Respondent and Local 148 had continued uninterrupted.

In March, the Respondent submitted "final" contract offers to both Unions. The employees voted to reject the offers. They also voted not to strike. Instead, they opted to remain on the job and pursue an "inside game" strategy designed to put pressure on the Respondent to accede to the Unions'

F.2d 362 (3d Cir.1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We have included a new Order and Notice that comports with the violations found and with the decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[5] All subsequent dates are in 1993 unless otherwise indicated.

bargaining demands. As described by its chief proponent, Local 702 Business Agent Gary Roan, the inside game consisted of employee refusals to work voluntary overtime and of "work-to-rule" tactics such as: adhering strictly to all company safety and other rules; doing exactly and only what they were told; reporting to work precisely on time and parking work trucks at company facilities at day's end (thus precluding employees from responding to after-hours emergencies); presenting all grievances as a group; advising nonemployees to report unsafe conditions; and advising customers of their right to various company information and of their right to have their meters checked annually for accuracy.

On April 24, the employees commenced their inside game campaign. The parties continued to negotiate, however, for the next several weeks. During this time, Charles Baughman, the Respondent's industrial relations manager, confronted Local 702 Business Representative Dan Miller with a copy of suggested work-to-rule activities that Miller had prepared for his union stewards. They discussed certain items on the list, after which Baughman stated that the Respondent "was not going to put up with this shit." One of the items on the list called for employees to "present all grievances as a group." Pursuant to this strategy, approximately 20 employees at the Respondent's Newton powerplant massed at their supervisor's office on May 12 to protest the suspension of two of their fellow employees for refusing to provide what they believed to be confidential information on their sick leave form. Miller and Baughman quickly settled the matter by agreeing tentatively that Newton employees could omit assertedly confidential information on their sick leave forms. Baughman added, however, that in the future he was "not going to tolerate these mass grievance meetings."

On May 20, the Respondent locked out all Local 702 and 148 unit employees. Officials of both Unions were personally

notified of the lockout by Baughman, who explained to Miller that the decision was a response to the work-to-rule practices and the refusals to work overtime and to provide medical information on sick leave forms. In letters sent to Local 702 unit employees on May 20, the Respondent's CEO elaborated further on the reasons for the lockout, stating that:

> Based on the events of the last few weeks, I do not feel there is any other alternative. During this period, the Company has failed to receive what it is entitled to from employees represented by IBEW Local 702 in return for the wages and benefits which make it possible for you to provide your families with security and well-being. We have consistently encountered refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel. These conditions are neither acceptable nor warranted.

The Respondent sent substantially similar letters to employees represented by Local 148.

During the lockout, the Respondent continued to negotiate with both Unions. On June 14, agreement on a new contract was reached between the Respondent and Local 148. After the parties signed the agreement on June 21, the Respondent ended the lockout against Local 148 but the employees refused to return to work as a show of support for the employees represented by Local 702. On August 25 the lockout of Local 702 employees was ended, but agreement on terms for a new contract was not reached until January 1994.

The Judge's Decision

To determine whether the lockout was lawful, the judge found it necessary to determine first the reason why the Respondent implemented it. He concluded that the lockout was "in reprisal" for the Unions' inside game tactics of

refusing to work overtime, engaging in work-to-rule practices, and presenting the sick leave grievance as a group.

The next question in the judge's analysis was to determine whether the inside game tactics were protected, since, if they were not, a lockout in response to unprotected activity would presumably not be unlawful. He concluded that the inside game activities were all protected. Specifically, the judge found that overtime was voluntary and, therefore, the refusal to work was protected because it did not constitute an unlawful partial strike. See, e.g., *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965) ("the vice of a partial strike is the employees' attempt to establish and impose upon the employer their own chosen conditions of work"). He also found that the work-to-rule practices were protected because the objective evidence failed to establish a resulting work slowdown or loss of worker productivity, and because Respondent officials never advised employees that their conduct, including strict adherence to safety rules, was excessive and unacceptable.[6]

Finally, applying the test set forth in *Wright-Line*[7] for resolving whether employer, hiring, discharge and discipline decisions are unlawful, the judge found that the General Counsel met the initial burden of proving that the lockout was to punish employees for engaging in protected activity. He further found that the Respondent failed to meet its burden of demonstrating that the lockout was justified by legitimate business reasons. Accordingly, the judge concluded that the lockout violated Section 8(a)(1) and (3).

---

[6] In a similar vein, the judge also concluded that evidence failed to establish that the inside game was rendered unprotected by employee acts of sabotage or by an attempt by Local 702 to have the Respondent agree to a contractual "hot cargo" clause prohibited by Section 8(e) of the Act.

[7] 251 NLRB 1083 (1980).

Analysis

For the purpose of the following analysis, we shall start by taking the same approach that the Board took in two recent cases involving inside game tactics. We shall assume, without deciding, that the judge is correct in finding that the conduct encompassed by the inside game constituted activity protected by the Act.[8] We conclude, however, that Respondent did not violate the Act by locking out its employees in response to this strategy.

As noted above, the judge commenced his analysis with an inquiry into the reasons behind the Respondent's lockout decision. We think it essential to commence the analysis one step earlier by inquiring into the reasons behind the Unions' decision to institute its inside game strategy.

We agree with Local 702 that "it was never in dispute that the employees were engaging in the refusal of overtime and work to rule activities in order to put economic pressure on the company to reach a contract." (Local 702 Answer Br. at 19.) Employees represented by both Unions were plainly made aware of this objective during their member ship meetings in April at which they voted to reject the Respondent's "final" contract offers. Business Representatives Roan of Local 702 and Donald Giljum of Local 148 persuaded employees that a strike in support of their bargaining demands was too risky a strategy because of the possibility of permanent replacement. There was an "alternative" to a strike, they were told, that was as effective as the strike but without the risk, i.e., the inside game. They chose the latter.

---

[8] See e.g., *Caterpillar, Inc.*, 324 NLRB No. 36 (1997) and *Caterpillar, Inc.*, 322 NLRB 674 (1996) in which the Board, in adopting judges' findings of Sec. 8(a)(1) violations, assumed arguendo that the work-to-rule tactics applied therein were not protected.

It matters little to the outcome in this case which choice the employees made. Whether viewed as a strike or an "alternative strike," the inside game was, by the Unions' admission, an economic bargaining weapon wielded in support of their contractual demands. The question in this case becomes whether the Respondent may, without violating Section 8(a)(1) and (3), counter the Unions' economic weapon with an economic bargaining weapon of its own in the form of a lockout. Applying the test set forth in *Great Dane Trailers*,[9] with reference to the Supreme Court lockout cases in *American Ship Building*[10] and *Brown Food Stores*,[11] we find that it may.

Antiunion motivation is an essential element of any 8(a)(3) violation. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983). To determine whether the Respondent's lockout was motivated by antiunion animus in violation of Section 8(a)(3), the following framework was developed by the Supreme Court in *Great Dane Trailers*:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come

---

[9] *NLRB v. Great Dane Trailers*, Inc., 388 U.S. 26 (1967). *See also Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 844 (8th Cir.1973) ("the legality of an employer's conduct in a lockout should be determined by principles set out . . . in *Great Dane Trailers*).

[10] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

[11] *NLRB v. Brown Food Stores*, 380 U.S. 278 (1965).

> forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Great Dane Trailers, 388 U.S. at 34 (emphasis in original).[12]

Under this framework, if an action is deemed inherently destructive of employee rights, antiunion motivation is presumed and the conduct will be found unlawful under the first test of *Great Dane*, whether or not such conduct was based upon important business considerations. However, if the action is deemed to have only a comparatively slight impact on employee rights, an affirmative showing of antiunion motivation must be made to sustain a violation under the second test of *Great Dane*, if the employer has first come forward with evidence of a legitimate and substantial business justification for its conduct.[13]

Thus, the first question presented under the *Great Dane* analysis is whether the Respondent's lockout was inherently

---

[12] The Court subsequently held that the foregoing analysis also applies in determining alleged violations of Sec. 8(a)(1). *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967).

[13] In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Court revised the first *Great Dane* test by requiring the Board, even in circumstances where employer conduct is found to be inherently destructive, to weigh any asserted business justifications against the invasion of employee rights in order to determine whether an unfair labor practice has been committed. This burden has been described as "heavy . . . if not impossible," *International Paper Co. v. NLRB*, 115 F.3d 1045, 1048 (D.C.Cir.1997), and there is no Board or court case in which employer conduct analyzed under this revised standard has been found to be lawful.

destructive of employee rights or, rather, had only a comparatively slight impact on such rights. We need not linger too long on this question because the Court in *American Ship* and *Brown Food* has already answered it. In *American Ship* the Court held that a lockout for the purpose of applying pressure on a union during a bargaining dispute is not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation." (380 U.S. at 309.) This finding was made in the context of an employer that did not take the additional step of hiring temporary replacements after the lockout to continue operations. But even if that had occurred, as it did in *Brown Food*, the Court therein found that such conduct is not inherently destructive of employee rights. 380 U.S. at 284. ("[W]e do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights").[14]

Accordingly, since it is clear from the foregoing that the lockout in the instant case, standing alone, cannot be considered inherently destructive of employee rights, we shall treat it as having a "comparatively slight" impact on employee rights and apply the second *Great Dane* test to determine the lockout's legality. That test requires first an analysis of whether the Respondent possessed a legitimate and substantial business justification for the lockout.

The judge found that it did not. He based his conclusion on findings that there was no impasse in negotiations with either Union, that the lockout was not in anticipation of an

---

[14] Although he found that the evidence was sufficient alone to establish that the lockout was a violation under the Wright Line standard, the judge found, alternatively, that the lockout was unlawful as inherently destructive of employee rights. In light of *American Ship* and *Brown Food*, that conclusion is rejected.

imminent strike, nor was it invoked to facilitate negotiations and reach agreement with the Unions. In the latter regard, the judge noted that in letters mailed to employees on the first day of the lockout on May 20, the Respondent never explained that it locked out employees in order "to get a contract." Rather, he found that in those letters and contemporaneous statements made to union officials, the Respondent made clear that the lockout had one, and only one, objective—to stop the Union's inside game activities. Because those activities were protected, he concluded that the Respondent's attempt to stop them could not be considered a legitimate and substantial business justification.

We reject this conclusion for two reasons. First, even assuming as true that the sole objective of the lockout was to force the Unions to cease their inside game activities, such is not an impermissible business objective. It merits repeating here that the Unions commenced economic warfare in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts. To win that battle they deployed the inside game weapon. To hold that it is not a legitimate business justification for the Respondent to defend against this weapon with a lockout in order to force the Unions to yield, ignores the Court's observation in *American Ship* that the "right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage." 380 U.S. at 309. This point does not become inapplicable simply because the inside game constituted protected activity. The strike in *Brown Food* was also an economic bargaining weapon in support of contract demands and no less protected than the inside game that the judge found was protected in this case. Nevertheless, in upholding the legality of the responsive lockout, the *Brown Food* Court reiterated the theme from *American Ship* that "although the lockout tended to impair the effectiveness of the whipsaw strike, the right to strike 'is not so absolute as to deny self-help by employers when legitimate interests of employees

and employers collide.' " 380 U.S. at 282, quoting *NLRB v. Teamsters Local 449* (*Buffalo Linen*), 353 U.S. 87, 96 (1957). Simply put, an employer is and "should be free to exert any force that has as its only effect compelling the union to yield in a current dispute,"[15] and if forcing the Unions to end their inside game in support of their demands in the current bargaining dispute was the Respondent's only purpose, it constituted a legitimate and substantial business justification for the lockout.

However, this was not the only objective of the lockout. Contrary to the judge, we find that the Respondent also sought resolution of issues that were dividing the parties in their bargaining negotiations. We base this finding on the same documentary evidence that the judge selectively cited in reaching a contrary finding—the May 20 letters mailed to employees by the Respondent's CEO. As noted, the judge construed those letters as sending the singular message that the lockout was a responsive measure to stop the inside game and that there was no indication in those letters that a goal of the lockout was to facilitate contract negotiations. We think a fair reading of the entire letter demonstrates otherwise. Thus, following the passage relied on by the judge, the remainder of the letter states:

> For over a year, Company and IBEW Local 702 negotiators exchanged proposals for a new Labor Agreement. During that period, numerous changes were made to our original bargaining position. In addition, the Company last fall promptly took the steps needed to make all employees represented by bargaining units "whole" following our discovery of mistakes concerning payment of Group Medical Plan premiums between July, 1991-December, 1992.

---

[15]Note, "Lockouts—Employers' Lockout with Temporary Replacements is an Unfair Labor Practice," 85 Harv. L. Rev. 680, 686 (1972).

On March 18, 1993, a final offer was made to the IBEW Local 702 Negotiating Committee. I believe that offer was fair and equitable in that it has provided you with an outstanding and competitive package of benefits and wages.

Subsequent to your rejection of this offer, the company modified its final offer because of the unusual circumstances surrounding our negotiations and the efforts of your negotiating team. We had repeatedly been told the barriers to the ratification of a new contract were Medicare carve-out and mirror image. These two issues were withdrawn from our final offer at a meeting with IBEW Local 702's Negotiating Committee on Friday, May 7, 1993. Even after this movement on the part of the Company your committee rejected our request to take the modified offer to your membership for a ratification vote.

In the week following the May 7th meeting, the work slowdown intensified. On May 13th, we were informed by the leadership of IBEW Local 702 that there was still no intent to give you and your fellow union members an opportunity to vote on our revised proposal.

These developments have led me to authorize this lockout. Like you, I am anxious to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date. I sincerely regret the disruption this decision will bring into your lives. My hope is that this aspect of our labor dispute is short-lived.

Each letter came with a multiple page attachment analyzing for employees the changes to the expired contract that the parties had thus far "agreed upon or which remain a part of the company's offer." The Respondent sent similar letters to employees represented by Local 148 describing the lone issue that precluded agreement on a new contract and setting forth the positions of the parties on that issue.

It is plain to us from this correspondence, as we think it must also have been to the employees, that a purpose of the lockout was to affect the outcome of negotiations between the Respondent and the Unions. The message conveyed by the Respondent in these letters was that it wanted employees to be allowed to review and consider its most recent contract proposals. Urging consideration and acceptance of one's bargaining proposals is clearly a legitimate bargaining position, and we find that application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business justification for the lockout within the meaning of *Great Dane*.[16]

Our dissenting colleague seeks to draw a distinction between a lockout in support of a bargaining position and a lockout aimed at the protected activity of a strike (or, in this case, an inside game strategy). The dissent then goes on to say that we have ignored evidence that the lockout here fell in the latter category.

As discussed infra, we think that the distinction is fundamentally unsound in the context of this case. The inside game strategy was an economic weapon used in support of the Unions' bargaining position and against the Respondent's bargaining position. The Respondent's lockout was simply its economic weapon in response to the Unions' economic weapon. Thus, the lockout was both a weapon in support of the Respondent's bargaining position and a weapon in opposition to the Unions' weapon which was used in support of the Unions' bargaining position.

---

[16] Neither the absence of impasse or threat of an imminent strike precludes a finding that a lockout in support of a legitimate bargaining position is lawful. *Darling & Co.*, 171 NLRB 801 (1968), enfd. sub nom. *Lane v. NLRB*, 418 F.2d 1208 (D.C.Cir.1969). We reject, therefore, the judge's contrary findings in this regard.

As discussed below, the Act permits the use of such weaponry as part and parcel of a bargaining dispute. Thus, it makes little sense to say that the lockout was caused by the inside game strategy rather than by the respective bargaining positions of the parties. The truth is that the two are inextricably tied in this case.

By not seeing the connection between bargaining and the use of economic weaponry, the dissent and the judge suffer from the same myopia. They recognize that the inside game tactics furthered the Unions' interests in contract negotiations. Yet they see no relation between the Respondent's opposition to these tactics and its own bargaining position. The refusal to recognize the obvious connection on both sides of the bargaining table between the use of economic weaponry and the overarching economic bargaining dispute makes no practical sense. This point is supported not only by the reality of the collective-bargaining process itself but also by the Supreme Court's central theme in both *Insurance Agents*[17] and *American Shipbuilding*, i.e., that the tools of economic warfare are so directly related to the substantive bargaining positions of the parties, that undue regulation of the former will inevitably enmesh the Board in an impermissible control of the latter. The dissent ignores the teaching of this Supreme Court precedent and proceeds upon the abstract and erroneous assumption that there is no or little relationship between these two subjects.

Our dissenting colleague appears to concede that the "initial motivation" for the Unions' inside game was to support its bargaining position. There is nothing to suggest that, somehow, the inside game had a subsequent change in purpose. Thus, the inside game continued to be a weapon to achieve the Unions' bargaining position. That bargaining position was contrary to the Respondent's bargaining posi-

---

[17] *NLRB v. Insurance Agents*, 361 U.S. 477 (1960).

tion. It would seem to follow that a lockout in opposition to the inside game is perforce a lockout in opposition to the Unions' bargaining position, and in support of Respondent's bargaining position. We do not regard this as "facile logic." Rather, it is economic realism and rational logic.

Our dissenting colleague also asserts that the Respondent was "hostile" to the inside game strategy, and that such hostility motivated the lockout. However, the only evidence on which she relies is the evidence that the Respondent's lockout took into account the fact that the Union resorted to its inside game. However, as discussed above, the Unions' inside game was inextricably intertwined with the Union's bargaining position. Thus, the lockout was not because of "hostility" toward the inside game or toward union membership or activities. Rather, the lockout was related to the inside game which was resorted to by the Unions in support of their bargaining position and in opposition to the Respondent's bargaining position.[18]

Notwithstanding our finding that the lockout served a legitimate business interest, a violation of Section 8(a)(1) and (3) may still be found if the evidence warrants an inference that the Respondent's use of the lockout was motivated by antiunion animus. That is the final question under the *Great Dane* analysis to which we now turn.

As an initial matter, when read together, the holdings in *American Ship* and *Brown Food* preclude the Board from inferring antiunion motivation "solely from the application of economic pressure during the bargaining dispute." *Ottawa Silica Co.*, 197 NLRB 449, 451 (1972). Each of the cited cases involved a lockout in response to a strike or the threat of a strike in the context of a bargaining dispute. Here, we address the legality of an employer's lockout in response to

---

[18] We are not presented with a situation where a lockout is in response to protected activity that is unrelated to a union's bargaining position.

inside game tactics undertaken as an alternative to strike action in the context of a bargaining dispute.

It is well established and frequently stated, however, that the Board may not act as "arbiter of the sort of weapons the parties can use in seeking to gain acceptance of their bargaining positions." *Insurance Agents*, 361 U.S. at 497. Our dissenting colleague pays lip service to this principle, but her subsequent analysis betrays her allegiance. Indeed, a central feature of her analysis is the premise that "the inside game is quite different from a strike," and therefore, an employer cannot use the lockout weapon to the same extent, if at all, that *American Ship Building* and *Brown Food Stores* clearly permit in response to a strike. Not only does this reasoning fly in the face of *Insurance Agents*, but it also cannot be reconciled with a subsequent observation by the Supreme Court in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), a preemption case involving an employee boycott of overtime during a bargaining dispute (one of the same actions taken by the Respondent's employees here). The Court there stated that "even were the activity presented in the instant case 'protected' activity within the meaning of Section 7, economic weapons were available to counter the Union's refusal to work overtime, *e.g. a lockout*. . . ." 427 U.S. at 152-153 (citations omitted; emphasis added).[19]

---

[19] Concededly, the cited language is dictum, i.e., not necessary to the resolution of the issue presented in *Machinists*. It is nevertheless instructive as to the Supreme Court's thinking on the point addressed. Indeed, at least one major legal principle on permissible economic weaponry during labor disputes originated as dictum. *See, e.g., NLRB v. Mackay Radio*, 304 U.S. 333 345-346 (1938) (addressing the right of employers to hire permanent replacements for economic strikers).

Chairman Gould also notes the analysis of nonmajority remedial bargaining orders that he and several courts of appeals have based, at least in part, on dictum in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969). *See Nabors Alaska Drilling, Inc.*, 325 NLRB No. 104, slip op. at

Based on this clear precedent, "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus." *Brown Food*, 380 U.S. at 288. The Court suggested, as examples, evidence indicating that the lockout was intended to "discourage union membership" or that was used "in the service of designs inimical to the process of collective bargaining." *American Ship*, 380 U.S. at 308, 312-313. No such evidence was found in *American Ship* or *Brown Food*, and some of the same considerations that resulted in that finding support the conclusion here that the Respondent's lockout was not motivated by union animus.

First, here, as in *American Ship*, "[t]here is no claim that the [Respondent] locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the [Respondent] conditioned rehiring upon resignation from the union." Id. at 312. Second, just as in *Brown Food*, the employees could not have feared any adverse job effects beyond the term of the labor dispute because the Respondent made it abundantly clear in the May 20 letters that it was "anxious to bring the [bargaining] issues to a successful conclusion and have [employees] back at [their] jobs at the earliest possible date." Indeed, the Respondent gave even greater assurances here, in that it offered to end the lockout and return the employees if only they would abandon their inside game weapon. By contrast,

---

1-5 (Apr. 8, 1998) (W. Gould, dissenting); *Leslie Homes*, 316 NLRB 123, 131 (1995) (W. Gould, concurring); and *Loehmann's Plaza*, 316 NLRB 109, 114 (1995) (W. Gould, concurring). In all of these cases, Chairman Gould relied on the language and reasoning of the Court and this is an appropriate role for a subordinate Agency like the Board regardless of whether the language can be placed under the rubric of dicta.

Member Hurtgen notes that the Court in *Machinists* also suggested the hiring of *strike* replacements as a response to the Union's weaponry, citing *Mackay*. Contrary to Member Liebman's view, the Court was not speaking of *lockout* replacements.

the respondent in *Brown Food* conditioned the lockout's termination and the employees' return to work on their giving up their protected strike weapon *and* accepting the Respondent's bargaining proposals. Third, here, as in *Brown Food*, the Respondent agreed during the pre-lockout bargaining to continue in effect the union-security clauses from the old contracts.

Finally, as in both *American Ship* and *Brown Food*, there is no evidence in this case that the lockout was in the service of designs inimical to the process of collective bargaining.[20] In fact, what evidence exists is to the contrary. An established and stable bargaining relationship between the parties has prevailed for decades and, although it is true that during this

---

[20] *Riverside Cement Co.*, 296 NLRB 840 (1989), cited by the dissent, is distinguishable on this point. During collective bargaining in that case, the respondent imposed a rule requiring employees to furnish their own tools. This constituted a unilateral change in the employees' contractual terms of employment which the respondent implemented as an economic weapon in response to the union's bargaining tactics. But as the Board noted in *Daily News of Los Angeles*, 315 NLRB 1236, 1243 (1994), the use of economic weaponry during bargaining "is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining." Since the unilateral imposition of the rule regarding personal tools was contrary to lawful bargaining, the respondent's lockout in *Riverside* in support of the rule was unlawful. Here, by contrast, the lockout was not tainted by any conduct of the Respondent that could be characterized as inimical to the collective-bargaining process. See also *Carlson Roofing Co.*, 245 NLRB 13, 18 (1979), enf. denied in relevant part 627 F.2d 77, 83 (7th Cir.1980) ("Carlson did not negotiate but rather dictated" and engaged in "direct dealing with individual employees"; hence, the lockout in these circumstances was unlawful).

The dissent's reliance on *Highland Superstores*, 314 NLRB 146 (1994), is also misplaced. As noted by the Board in its opinion, the respondent in that case threatened to terminate employees, not merely lock them out, if they handbilled in support of their bargaining position. That was the basis for the Board's holding that the lockout was unlawful. The Respondent engaged in no such threatening conduct here. To the contrary, as noted above it pleaded with employees to return to work.

history negotiations have not always been consummated without resorting to the use of economic weapons, the Respondent has always fully accepted the Unions' representative status. Indeed, at no point during the instant bargaining was there an allegation of bad-faith bargaining on the part of the Respondent. The parties engaged in numerous and extensive negotiations for more than a year prior to the lockout and they continued to meet and bargain during the lockout, (as well as after the lockout in the case of the Respondent and Local 702). Indeed, both Unions involved have long represented the Respondent's employees and they enjoyed the support of these employees both with respect to the substantive positions taken during 1993 bargaining and the inside game tactic they recommended as a means of obtaining the Respondent's acceptance of its proposals.

Evaluation of the foregoing circumstances demonstrates, therefore, that "not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the [Respondent's] good faith." *Brown Food*, 380 U.S. at 290. Thus, we reject the judge's findings that the Respondent was really inspired by "anger" against employees for engaging in their protected inside game activities and that the lockout was a way to "punish" them. This finding was based on statements by company officials that it "was not going to put up with this shit", i.e., the inside game, and that the employees were unfairly "getting the best of both worlds" by "putting pressure on the company while still getting their paycheck for the daytime work."

We find it unreasonable to infer antiunion motivation for the lockout from these statements. In the context of economic warfare in support of collective-bargaining demands, "statements and conduct which could be the basis for inferring animus, which the parties each entertain toward the other, are not difficult to detect. The standard here, however, is not the existence of an inchoate animus but rather whether that

feeling did in fact motivate." *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir.1973).[21] We find that it did not.

Nor do we agree with the judge that union animus is appropriately inferred from the Respondent's intolerance of group grievances or its decision to continue operations during the lockout with nonunit personnel. As noted above, group presentation of grievances was part and parcel of the inside game strategy. As such, it remained subject to employer counterattack with the lockout weapon. It is important to note, however, that the Respondent did not refuse to accept or process grievances. As for the continuance of operations with nonunit personnel after the lockout, we again refer to *Brown Food*, where the Court stated "we do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself."

In sum, we find that under the test set forth in *Great Dane*, that the lockout here was not "inherently destructive" of employee rights and there were "legitimate and substantial" business interests justifying whatever comparatively slight impact the lockout may have had on employee rights. Because we have further found no specific evidence that the Respondent acted on the basis of an antiunion motive, we conclude that the lockout did not violate Section 8(a)(1) and (3) of the Act. Accordingly, we shall dismiss this aspect of the complaint.[22]

---

[21] When determining the motivating factor, "an unlawful purpose [will not be] lightly inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one." *Id.*, quoting *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir.1956).

[22] Consistent with this conclusion, we find no merit in the cross-exceptions of the General Counsel and Charging Parties to the judge's failure to find that the lockout constituted an independent violation of Sec.

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by terminating unit employees' health insurance coverage on May 21-22, and by failing to pay disabled employees supplemental workers' compensation benefits during the lockout. We do not, however, adopt the judge's rationale for finding these violations. Thus, the judge's primary theory of violation was that, the lockout was unlawful, and thus the discontinuation of health insurance and supplemental workers' compensation benefits was also unlawful. Because we have found that the Respondent lawfully locked out its employees, we reject this theory of violation.

Alternatively, the judge found that the Respondent's denial of wages and benefits was "inherently destructive" of important employee rights within the meaning of *Great Dane Trailers*, supra. Although we agree that the Respondent's conduct is unlawful under *Great Dane*, we do so on the following basis.

Great Dane holds that an employer violates Section 8(a)(3) and (1) when it terminates "accrued" employee benefits during a strike, absent adequate business justification. *Sargent-Welch Scientific Co.*, 208 NLRB 811, 820 (1974). This principle has been extended to situations, like here, where the employer discontinues accrued benefits during a lawful lockout. *Ottawa Silica Co.*, supra. The basis for this violation is set forth in *NLRB v. Local 155 International Molders and Allied Workers*, 442 F.2d 742, 746 (D.C.Cir.1971):

> While an employer may use its economic strength—its economic weapons—to pressure employees and their representative union to agree to its terms, and while the withdrawal of benefits here was economic pressure for

---

8(a)(1) or that the Respondent violated Sec. 8(a)(5) by locking out Local 148 employees.

> that purpose, when such a weapon as here was used is concomitantly "inherently . . . prejudicial to union interests," it becomes an unfair labor practice. *American Ship Shipbuilding Co. v. NLRB*, 380 U.S. 300, 311 [cite omitted]; see *NLRB v. Great Dane Trailers, Inc.*, [cite omitted]"

See also *Sargent-Welch Scientific Co.*, supra.

In order to establish a violation under *Great Dane*, the General Counsel must establish that the respondent has discontinued accrued benefits on the apparent basis of a strike or lockout. *Texaco, Inc.*, 285 NLRB 241, 245 (1987). Once the General Counsel makes out a "prima facie showing of at least some adverse effect on employee rights, the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits." *Id.* at 246.

Here, the Respondent concedes, on brief, that the General Counsel has established a prima facie case that it unlawfully terminated employee benefits during the lockout. Indeed, the Respondent expressly admits that the May 21 and 22 insurance coverage and supplemental workers' compensation benefits had accrued as of the lockout, and that it failed to pay them. The Respondent's sole defense is that it was privileged to discontinue workers' compensation benefits and insurance coverage under the terms of the collective-bargaining agreements and the health plan document, respectively. In order to prevail on this defense, the Respondent must clearly establish that the "bargaining representative has clearly and unmistakably waived its employees' statutory right to be free from such discrimination or coercion." *Texaco*, 285 NLRB at 246. This the Respondent has not done. As to the workers' compensation benefit issue, the Respondent argues that the benefits are payable only when the employees are not working because of the injury or disability. The argument has no merit. As found by the judge, the collective-bargaining

agreements merely specify that supplemental workers' compensation benefits will be paid to "a regular employee who is injured and disabled in the course of his employment and who is unable to return to his duties," without regard to whether other factors would prevent the employee from returning to work. Similarly, although the health plan document specifies the minimum hours of work per week that an employee must be scheduled for eligibility, the 20 discriminatees had satisfied the obligation as of May 21 and 22, i.e., prior to the lockout.

Accordingly, for the foregoing reasons, we find that the Respondent violated Section 8(a)(3) and (1) by discontinuing employee benefits during the lockout.[23]

As discussed above, we have adopted the judge's findings that the Respondent violated Section 8(a)(3) by discontinuing health insurance benefits and workers' compensation supplemental benefits for employees of both Unions. We also adopt the judges' findings that the Respondent violated Section 8(a)(5) by failing to timely provide Local 702 requested information relevant to the Newton grievance and Chairman Gould and Member Liebman adopt the judge's finding that the Respondent violated Section 8(a)(5) by failing to provide the names of outside companies supplying power to the Respondent.[24] However, Chairman Gould and Member

---

[23] Member Hurtgen concurs in this result. Under a "contract coverage" analysis, rather than a "waiver" analysis, the Respondent's conduct was not privileged by the contract. See *NLRB v. U.S. Postal Service*, 8 F.3d 832 (D.C.Cir.1993).

[24] We correct, however, a factual error made by the judge with respect to the latter finding. Local 702's letter of June 8 was a request for information pertaining to power purchased by Respondent since May 20, 1992, rather than since May 20, 1993.

Contrary to his colleagues, Member Hurtgen would not find that the Respondent violated Sec. 8(a)(5) by failing to timely provide Local 702 with requested information concerning outside companies which supply power to the Respondent. Thus, the Union admittedly sought this

Hurtgen decline to infer from these violations that the lockout was unlawfully motivated or that it was for the purpose of evading the duty to bargain.

With respect to the 8(a)(5) violations, there is no evidence that negotiations were adversely affected by the Respondent's failure to promptly furnish Local 702 with the information it requested. The first request was for information necessary to resolve several grievances at the Newton Power Station alleging that unit work was subcontracted in violation of certain provisions of the parties' most recent contract. According to Local 702, it "wanted the information in connection with negotiating a divisions subcontracting clause" (Support Br. at 27), but as the judge noted "Local 702 made clear that it regarded subcontracting as a relatively minor issue, and no obstacle to contractual agreement." See

---

information for the purpose of determining whether it could expand its economic weapons to the suppliers. However, as the Board made clear in *General Electric*, 294 NLRB 146, 160 (1989), where, as here, the requested information is "relevant only to the parties' actual or potential use of economic pressure against one another, the Act does not require production." See also *Union-Tribune Publishing*, 220 NLRB 1226 (1975), enfd. 548 F.2d 863 (9th Cir.1977). [Note, the Seventh Circuit denied enforcement of the remaining portion of *General Electric* at 916 F.2d 1163 (1990)].

Further Member Hurtgen finds that *C-Line Express*, 292 NLRB 638 (1989), and *Central Soya Co.*, 288 NLRB 1402 (1988), on which the judge relies in finding a violation, are distinguishable. Thus, in C-Line, unlike here, the union additionally sought the information concerning the outside company to determine whether it was maintaining contractual wages and benefits and whether the respondent's contract with it caused lost job opportunities for unit employees. Member Hurtgen notes that there was no determination that the "use of weaponry" motive, standing alone, would have resulted in a duty to supply the information. In *Central Soya*, unlike here, the issue concerned the incumbent union's access to the plant, and not its request for information. In any event, even if those cases could be read as offering some support to the majority's position, Member Hurtgen notes that *General Electric*, which deals definitely with the issue now presented, was decided after both *C-Line* and *Central Soya*.

also General Counsel's Support Brief at 133 ("resolution of subcontracting issues, while desirable from Local 702's viewpoint, was never the sine qua non for reaching agreement"). Indeed, the parties reached agreements on new contracts in January 1994, months before the requested information was furnished.

Local 702's other information request had an even less attenuated nexus to the issues under discussion in collective bargaining. In that request, the Union sought the identities of the companies who supplied the Respondent with power before and after the lockout's commencement because, as Local 702 explained, "the union wanted to see if any other power companies were performing struck work" so that it could further determine "who it could picket/handbill under the ally doctrine."

With respect to the 8(a)(3) violations, the General Counsel and Local 702 expend no more than one sentence each in their comprehensive briefs contending that these violations may be considered as evidence that the lockout was unlawfully motivated. We disagree. The violation pertaining to the discontinuance of health insurance benefits covered just a 2-day period following the lockout, the Respondent promptly provided retroactive coverage for this period after being informed by the Board's Regional Office that it considered the discontinued benefits unlawful, and the parties stipulated that no claims were filed or unpaid for this 2-day period. As for the terminated workers' compensation supplemental payments, only 15 Local 702 employees and 6 Local 148 employees were affected. In units where Local 702 represented nearly 1000 employees and Local 148 represented almost 500 employees, we decline to infer from this violation that touched so few employees that the Respondent's lockout of all the union employees was antiunion motivated.

ORDER

The National Labor Relations Board orders the Respondent, Central Illinois Public Service Company, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Withholding from employees supplemental workers' compensation payments, denying them health insurance benefits or otherwise discriminating against them during the term of a lockout in the absence of language in applicable collective-bargaining agreements authorizing the suspension of health insurance benefits and supplemental workers' compensation payments.

(b) Failing or refusing to bargain collectively in good faith with Local 702 as the exclusive representative of its employees in the Newton, Southern, Western, and Eastern Units, by failing or refusing to promptly furnish Local 702 with information which is relevant and necessary to its function as such representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act.

(a) Make employees whole for any losses incurred as a result of the suspension of health insurance benefits and supplemental workers' compensation payments, from the date such benefits and payments were suspended until they were resumed, in the manner set forth in the remedy section of the judge's decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of reimbursement due pursuant to this Order.

(c) Within 14 days after service by the Region, post at its Springfield, Illinois headquarters and at each of its facilities in the state of Illinois, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 1993 with respect to the employees represented by Local 702 and November 9, 1993, with respect to the employees represented by Local 148.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 1998

William B. Gould IV, Chairman

Peter J. Hurtgen, Member

NATIONAL LABOR RELATIONS BOARD

---

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER LIEBMAN, concurring in part and dissenting in part.

Today a majority of the Board holds that an employer may lawfully lock out employees to pressure them to abandon their protected "inside game" strategy adopted, as an alternative to a strike, in support of the Unions' demands at the bargaining table. In doing so, my colleagues deal an obvious blow to those exercising Section 7 rights and ignore the ample record evidence that the lockout was motivated by the Respondent's desire to retaliate against employees for engaging in activities on behalf of the Unions. While I agree with the majority that *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), governs the lawfulness of the lockout, I nevertheless agree with the judge that, under the *Great Dane* analysis, the lockout was motivated by antiunion considerations, in violation of Section 8(a)(3) of the Act, and was not justified by legitimate and substantial business objectives.[1]

FACTUAL BACKGROUND[2]

The Respondent and Local 702 of the International Brotherhood of Electrical Workers, AFL-CIO (Local 702) began negotiations for a new collective-bargaining agreement in April 1992.[3] About April 19, 1993,[4] the Local 702 mem-

---

[1] For the reasons stated by the judge (including his alternative rationale adopted by my colleagues), I agree that the Respondent unlawfully terminated health insurance benefits for Local 702-rrepresented employees on May 21 and 22 and supplemental workers' compensation payments to disabled employees during the lockout, in violation of Sec. 8(a)(3) and (1). I also agree with the judge and Chairman Gould that the Respondent violated Sec. 8(a)(5) by failing to timely provide Local 702 requested information relevant to the Newton grievance and on outside companies supplying power to the Respondent.

[2] The factual background of this proceeding is set forth in comprehensive detail in the judge's decision.

[3] Local 702 represents about 1000 operations and maintenance employees of the Respondent's "divisions" and its Newton Power Station.

[4] All dates hereafter are in 1993 unless otherwise noted.

bership voted to reject the Respondent's "final" contract offer. The union leadership recommended against a strike because they believed the Respondent would hire replacement employees. The membership accordingly voted to pursue a strategy known as the "inside game."

Pursuant to that strategy, employees remain at work and may engage in any of the following conduct: holding union rallies, wearing arm bands, engaging in informational picketing during nonworking time, reporting to work exactly on time (instead of earlier), refusing to work voluntary overtime, adhering strictly to laws, safety requirements, and other company work rules (work-to-rule), presenting grievances as a group, reporting all injuries and seeking proper medical treatment, reporting all gas leaks, advising nonemployees to report unsafe conditions, advising customers of their right to have their meters checked annually for accuracy, and parking work trucks at the Respondent's facilities instead of taking them home.[5] Many of these activities were laid out in a union-prepared list of suggested conduct, which also urged employees to take pride in their work and do "perfect work." The Local 702 leadership specifically cautioned employees to perform their work in a workmanlike and safe manner while engaged in inside game conduct. None of the suggested inside game activities violated the Respondent's rules.

Local 702-represented employees participated in inside game activity from April 24 to May 20, and on May 20, the Respondent locked them all out. Fourteen weeks later, on August 25, it announced that it was ending the lockout, although no agreement had been reached on a new contract.

---

[5] Employees would take trucks home in case of overtime work. But, the Respondent's supervisors requested employees to leave their trucks if they did not intend to take overtime, in order to make the trucks available for use by supervisors. It is undisputed that employees who typically took trucks home had no obligation to do so.

In January 1994, the Respondent and Local 702 agreed on terms for a new contract.

The Respondent concurrently began separate negotiations for a new collective- bargaining agreement in April 1992 with Local 148 of the International Union of Operating Engineers, AFL-CIO (Local 148).[6] In April 1993, Local 148 rejected the Respondent's "final" contract proposals. It decided not to strike, but, instead, to refuse overtime except when contractually required. After April 24, Local 148 embarked upon an inside game strategy, which included wearing black armbands and assembling and going to work in a group. The Respondent locked out all Local 148-represented employees on May 20. The Respondent and Local 148 reached tentative agreement on a new contract on June 14, the employees thereafter ratified the contract, and it was signed on June 21. The Respondent then announced that it was ending the lockout against Local 148. Local 148 employees chose to honor Local 702's picket lines, and did not return to work until the Respondent ended the lockout against Local 702 on August 25.

A. Group Presentation of Grievances

In July 1992, the Respondent and Local 702 tentatively agreed during negotiations over the Newton location to a new sick leave procedure requiring employees to indicate on a written form the nature of the illness. On March 18 and 19, Local 702 Business Representative Miller expressed concern to the Respondent's manager for industrial relations, Charles Baughman, that the new procedure lacked confidentiality safeguards and thus appeared to violate the Americans with Disabilities Act. On May 12, two Newton Power Station employees returned to work from sick leave and entered "sick" on the form. They were told by Supervisor Butler not

---

[6] Local 148 represents about 480 production and maintenance employees at four of the Respondent's five power stations.

to report to work until they gave more detailed information. Butler testified that the two employees were in effect suspended without pay until they fully completed the sick leave form.

The next morning a group of 20 employees requested and were granted a meeting with management to discuss the matter. They asked why they had to complete the forms, and management cited the July 1992 agreement. As the judge found, there is no evidence "that the employees left or neglected work to attend the meeting, or were ordered to return to work." Indeed, Butler testified that the employee group was composed of an entire off-duty shift.

The sick leave reporting issue was referred to Baughman and Miller for resolution. Baughman declared that he "wasn't going to put up with that, a bunch of people marching up to the superintendent's office to have a meeting" and later re-emphasized that he was "not going to tolerate these mass grievance meetings." Miller replied that employees were reluctant to meet alone with management concerning disciplinary matters. Miller and Baughman quickly resolved the matter, however. They agreed that the two employees could return to work without loss of pay or providing further information. Also, for the time being, Newton employees who called in sick could simply note "sick" on the form without providing additional information.

B. Refusal of Voluntary Overtime

The Respondent has both prescheduled overtime and callout overtime for which employees are telephoned, usually at home outside of their regular working hours, when the need arises. From April 24 to May 20 nearly all unit employees declined callout overtime, but they did not refuse prescheduled overtime. The callout overtime was handled by supervisors and nonunit engineers. Supervisor Ankrom testified that these nonunit personnel were able to adequately cover the callout overtime and provide safe and reliable

service. The judge found that employees engaged in union-instigated and concerted refusals to take callout overtime work in support of Local 702's bargaining position, but there was no concerted refusal to work prescheduled overtime. Supervisor Ankrom testified that when he warned employees that they were required by the Illinois Commerce Commission to respond to reported gas leaks within 1 hour, they took the related overtime calls.

The judge concluded that the taking of callout overtime was voluntary, not mandatory. He painstakingly reviewed arbitral decisions involving the Respondent and Local 702, pertinent collective-bargaining provisions, documentary evidence of callout records, statements and positions taken (or not taken) by Local 702 and the Respondent over many years regarding callout overtime, and the parties' long established practices, including the manner in which they resolved grievances and complaints. He concluded that the Company never published or otherwise formally announced any rule making callout overtime mandatory. Over many years, employees frequently refused callout overtime and the Respondent never successfully administered formal discipline for such refusals.

The judge carefully considered and rejected the Respondent's contention that Local 702-represented employees had a collective obligation to perform callout overtime and that Local 702 was obligated to ensure that unit personnel performed such work. He concluded that the Respondent had long tolerated and accommodated itself to concerted refusals to perform overtime work during past labor disputes without disciplining employees. As to whether the callout overtime refusals were greater in scope than prior boycotts, he found that the Respondent "by its prior course of action, impliedly conceded that employees could engage, not simply in individual refusals to work overtime, but also in concerted refusals, even to the extent that non-unit personnel would have to perform the overtime work."

C. The Effect of the Inside Game

The Respondent presented 42 witnesses as well as company records to support its contention that the employee conduct included work slowdowns, loafing on the job, carelessness, sabotage, and excessive and unreasonable work-to-rule practices. After a comprehensive review, the judge found that the evidence did not support these contentions.

The judge found that there was no work slowdown campaign. Company records introduced into evidence "demonstrated that work was progressing at a normal or better than normal pace."[7] There was no evidence of complaints from state authorities, customers, or the general public concerning the speed or quality of service during the inside game period from April 24 to May 20—notwithstanding that some of the Respondent's services must be provided within strict time limits.[8]

---

[7] The records introduced into evidence were: (1) Division Work Authorization records, which contain estimates of the time needed to complete each job, coupled with completion reports showing the actual time taken to complete the job; (2) the reports of supervisors William Jurgena and Keith Riggs, who were asked by senior mechanical maintenance supervisor Gillette to prepare day-by-day and employee-by-employee comparisons of the amount of work expected to be performed, vis-a-vis work actually done; and (3) a work diary kept by coal yard supervisor Charlie King.

[8] The judge specifically credited the testimony of seven employees that there was no work slowdown. He discredited Respondent's witnesses asserting a work slowdown because of contradictions in their testimony, their admissions that work was proceeding, and the failure of the documentary evidence to corroborate their testimony. For example, superintendent Willis testified that he examined employees' work sheets but could not find from those records that employees were not "pulling their load." The judge rejected the Respondent's claim of a work slowdown at the Newton coal yard, concluding "that there was a total lack of objective evidence to indicate any loss of coal yard production after April 24."

The judge further found that neither Union engaged in any campaign of excessive or unreasonable work-to-rule practices. After April 24, the employees were generally more diligent and systematic in following rules, but safety supervisors were unable to fault employees for doing so, even when they took more time in inspecting and checking equipment, asked numerous questions, or requested additional safety equipment. As the judge found, the Respondent "made clear that it expected the employees to adhere to safety and work rules, and that employees could be disciplined for failure to do so." Manager Baughman testified that from April 24 to May 20, employees strictly followed rules, he never told any union representative that the employees should not follow any company or safety rule, and he never informed Local 702 that employees were engaging in excessive work-to-rule practices. Further, the evidence failed to show that Local 148 or its members engaged in any work-to-rule activity. Rather, Local 148-represented employees followed safety and work rules in the same manner as before April 24.

The evidence also failed to demonstrate any campaign of calculated carelessness or sabotage by Local-702 represented employees. None of the Respondent's witnesses accused the employees of insubordination during the period from April 24 until the lockout commenced on May 20. Indeed, notwithstanding the refusal to work voluntary overtime, employees complied when they were given a direct order to work overtime. As the judge concluded, "the evidence indicates that both Unions sought to carefully restrict the inside game campaign to actions which they believed were permissible, and without abandoning the campaign, were cooperative in getting work done."

Analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by locking out all employees represented by Local 702 because those employees engaged in

protected concerted and other union activities, including refusing to work nonmandatory overtime, adhering strictly to work rules, and adhering strictly to the sick leave information procedure agreed upon by the Respondent. The complaint additionally alleges that from May 20 through June 21 the Respondent violated Section 8(a)(1), (3), and (5) by locking out all the employees in the Local 148-represented bargaining units.[9]

The Supreme Court in *Great Dane* articulated the following framework for assessing employer motivation for discriminatory conduct.

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motive is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight, an antiunion motivation must be proved to sustain the charge" *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34 (emphasis in original).

---

[9] At the outset, and for the reasons given by the judge, I agree that the inside game activities were protected by the Act. The majority has assumed without deciding that the judge was correct in so finding.

In my view, the record amply demonstrates that the lockout was motivated by antiunion considerations. I, therefore, do not reach the question whether it was "inherently destructive" of employee rights. *Cf. American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown Food* Store, 380 U.S. 278 (1965). In accord with the majority, I have analyzed the lockout under *Great Dane* as having had a "comparatively slight" impact on employee rights. Accordingly, the next inquiry is whether the Respondent has come forward with evidence of a legitimate and substantial business justification for the lockout.

A. The Business Justification Issue

1. Economic pressure in support of its bargaining position

My colleagues in the majority find that the Respondent's motivation behind the lockout was, in part, the application of economic pressure in support of its bargaining position and that this constitutes a legitimate and substantial business justification under *Great Dane*. They premise this finding solely on the May 20 letter from the Respondent's president and chief executive officer, Greenwalt, to employees announcing the reasons for the lockout. In their view, the letter conveyed to employees the message that "it wanted employees to be allowed to review and consider its most recent proposals" and that "the purpose of the lockout was to affect the outcome of negotiations."

In contrast, the judge concluded that the Respondent had failed to come forward with evidence establishing that the Respondent locked out the employees to support its bargaining position. First, the judge carefully examined the testimony of the Respondent's senior officials who made the decision to lockout. He specifically did not credit the testimony of President Greenwalt, Senior Vice-President for Operations Dodd, and Manager for Industrial Relations

Baughman asserting that the Respondent locked out its employees as a means of getting a contract. He based this credibility determination on his finding that their testimony was "contradictory or internally inconsistent." It is axiomatic that the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the record evidence convinces the Board that the findings are incorrect.[10] Yet, the majority does not even acknowledge that the judge's conclusion as to the motivation for the lockout is anchored in credibility determinations.

Second, the judge reviewed numerous press releases and correspondence issued by the Respondent and found that none of those communications state that the lockout was intended to facilitate negotiations to get a contract. Rather, the documents explain that the lockout was because of the overtime refusals, work- to-rule practices, and some also cite the refusal to furnish sick leave information. The majority disregards this documentary evidence.

Third, the judge rejected the Respondent's asserted motivation for the lockout because the evidence affirmatively showed that the lockout was in reprisal for the inside game conduct. On the first day of the lockout, when asked why the employees were locked out, Baughman explicitly told union officials that it was because of the overtime refusals, work-to-rule practices, and refusal to furnish sick leave information. Baughman gave no other reasons for the lockout. Further, the testimony of all the Respondent's top officials-Greenwalt, Dodd, and Baughman-confirmed that their overriding concern leading to the decision to lockout was the inside game and in particular the overtime refusals. Baughman testified that the Respondent's main concern was

---

[10] *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir.1951).

the overtime refusals, and that absent such refusals there probably would have been no lockout.

Fourth, the judge did not credit the Respondent's asserted motivation because of its shifting explanations for the lockout. Prior to July 22, the Respondent never said, or even intimated, to the public, the Unions, the unit employees, or the Board's Regional Office any concern about a strike. But, on July 23, the Respondent announced for the first time, in a letter to the press, that it locked out the employees because it had reason to believe that a strike would be called. The judge found that the Respondent did not present any credible explanation for its failure prior to July 22 to assert fear of a strike as a reason for the lockout.[11]

Fifth, the judge reviewed what is undoubtedly the single most important piece of evidence regarding the Respondent's motivation, the May 20 letter to employees from Respondent's President Greenwalt announcing the reasons for the lockout. As the judge explained, the letter explicitly states at the outset that the Respondent had no alternative but to lockout the employees because of "the events of the past few weeks." These "events" are expressly described as "refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary [sick leave] information to supervisory personnel." Thus, the Respondent itself expressly tied the lockout decision to the employees' "inside game" activities. "These conditions," it said, "are neither acceptable nor warranted."

My colleagues in the majority rely on the fact, however, that attached to this letter was an analysis of the Respondent's

---

[11] The judge likewise observed that manager Baughman testified that a reason for the lockout was in part because Local 702 proffered an illegal subcontracting clause. No other witness for the Respondent cited that as a motivation for the lockout. Neither Baughman nor Greenwalt testified that the lockout was instituted, in whole or in part, to improve the Respondent's bargaining position or obtain a contract.

contract proposals and, in the text of the letter, Greenwalt discussed the course of the contract negotiations. Unlike my colleagues, I am fully in accord with the judge that the mere discussion of the negotiations in the letter does not override the letter's express statement to employees that the reason for the lockout was their "inside game" concerted activities. Nowhere does the letter state that the lockout was intended to facilitate negotiations or to get a contract. Nor does the letter state that the Respondent anticipated a possible strike, or that Local 702 proffered an illegal subcontracting clause, Respondent's other after-the-fact asserted "motivations" for the lockout. Like the judge, I take the Respondent at its word and rely on the explicit contemporaneous reasons that it gave employees when it locked them out.

Significantly, the Respondent never made acceptance of its bargaining proposals a condition for ending the lockout.[12] Several of the Respondent's officials testified that but for the inside game the lockout would not have occurred, and, as the majority concedes, the Respondent offered to end the lockout if the employees would end their inside game. In fact, the Respondent ended the lockout on August 25, almost a full five months before it and Local 702 reached agreement on a new contract. There is thus no basis to conclude that the Respondent's reason for the lockout was to facilitate an agreement or pressure the Unions to accept its bargaining positions.

The reasons advanced by the Respondent itself in the May 20 letter, viewed with all of the other voluminous testimonial and documentary evidence so painstakingly analyzed by the judge, convince me that the judge was correct. The Respondent failed to establish that the lockout was, in fact, brought to assert economic pressure in furtherance of its

---

[12] Compare *White Cap, Inc.*, 324 NLRB No. 220, slip op. at 4 (July 23, 1998) (respondent's lockout notice specifically conditioned the return to work upon the union's signing of the respondent's final offer).

bargaining proposals. That explanation is simply a belated attempt to validate an unlawful lockout.

2. Economic pressure to stop the inside game

According to the majority, "even assuming as true that the sole objective of the lockout was to force the Unions to cease their inside game activities, such is not an impermissible business objective." In their view, the Respondent could lawfully counter the Unions' economic weapon (the inside game) with an economic weapon of its own (the lockout). An employer is "free," they say, "to exert any force that has as its only effect compelling the union to yield in a current dispute."

Concededly, the Board's function is not to act as an "arbiter of the sort of weapons the parties can use in seeking to gain acceptance of their bargaining positions." *NLRB v. Insurance Agents*, 361 U.S. 477, 497 (1960).[13] But, to the extent that the majority is saying that the lockout was a weapon used to gain acceptance of bargaining positions, that claim is not supported by the record, as discussed above.[14]

---

[13] I do not, as my colleagues accuse me, lack "allegiance" to the principle stated in *Insurance Agents*. Thus, I do not question the right of either party to use economic pressure to achieve particular terms and conditions of employment. However, the issue in *Insurance Agents* was whether the Board properly found that a union violated its duty to bargain in good faith, pursuant to Sec. 8(b)(3) and 8(d) of the Act, by engaging in certain arguably unprotected tactics at the workplace in support of its bargaining position. Id. at 490. The Court emphasized that the Board's approach "involve[d] an intrusion into the substantive aspects of the bargaining process . . . unless there is some specific warrant for its *condemnation of the precise tactics involved here*." Id. (emphasis supplied). In this case, the issue is not either party's good faith in the bargaining process, but rather whether the Respondent locked out employees in retaliation for union activities. Clearly, if there is evidence—as there is here—that the tactic was intended to retaliate, then there is "some specific warrant" for condemning those tactics.

[14] The majority asserts that, in so concluding, both the judge and I suffer from "myopia" because we have ignored the fact that the employees

To the extent that they are saying that the lockout was an economic weapon lawfully used for the sole purpose of counterattacking the inside game, their position is not sustainable. While the parties generally have their choice of economic weapons, this choice is not unrestricted. The pressure exerted may not be directed toward inhibiting the exercise of section 7 rights, and a lockout prompted by an antiunion motive is plainly illegal. Simply because the Respondent used an economic weapon to counterattack an economic weapon used by the Unions in support of their bargaining demands, does not mean, as our colleagues hold today, that the Respondent's use of that weapon was legitimate.

---

engaged in the inside game were acting in support of the Unions' position at the bargaining table. They say that I have created a "fundamentally unsound" distinction between a lockout in support of a bargaining position and a lockout aimed at stopping the inside game and that I fail to acknowledge the connection between economic weaponry and bargaining. Indeed, it is they who have failed to recognize the distinction between a lockout in support of a bargaining position and one actuated by a desire to discourage protected union activities. Rather than focus on the record, which is devoid of evidence—and thus does not support their position—that the motive of the lockout was "a desire to bring economic pressure to secure prompt settlement of the dispute on favorable terms" (*American Ship Building Co. v. NLRB*, 380 U.S. at 305), the majority resorts to facile logic. Thus, the majority bootstraps from the Unions' initial motivation for the inside game—to advance its bargaining position—and holds that, *a fortiori*, the Respondent's motivation for the lockout must have been to advance its bargaining position; but, even if the Respondent's *sole* objective was to cause the employees to cease the inside game, then, *a fortiori*, its objective must have been to advance its bargaining position. This circular reasoning simply does not withstand scrutiny. While economic weaponry and bargaining may certainly be connected, it is actual evidence of motive, and not sweeping generalization, that determines the 8(a)(3) issue. To obfuscate this point, they accuse me of myopia. If it be myopic to focus on actual evidence of intent, then I am guilty as charged, but I believe that the Board should be chary of sweeping generalizations in this complex area.

The Supreme Court has construed Section 8(a)(3) "to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion." *American Ship Building*, supra at 300 U.S. at 311. It is settled that a lockout motivated by legitimate and substantial business justification rather than animus against union activity does not violate the Act. Longstanding jurisprudence shows that legitimate business justification for a lockout has encompassed a broad range of objectives, including using the lockout to exert economic pressure in support of legitimate bargaining positions;[15] continuing business operations during the labor dispute;[16] fear of a strike being called during peak business season;[17] preserving the integrity of a multi-employer bargaining unit;[18] and an objectively based belief that securing employer property is necessary to prevent violence.[19] Conspicuously absent from this precedent, however, is any indication that the Board or the courts have ever endorsed the proposition endorsed by my colleagues in the majority, that the goal of forcing employees to cease engaging in protected activities in support of a union is a legitimate and substantial business objective.

Indeed, the Board has long held that an employer violates Section 8(a)(3) and (1) of the Act by locking out employees in response to their protected activities, unless the employer shows that the lockout was instituted to support its bargaining position. In *Highland Superstores*, 314 NLRB 146 (1994), the employer informed employees that they would no longer have

---

[15] *American Ship Building Co. v. NLRB*, supra 380 U.S. at 309; *Ottawa Silica*, 197 NLRB 449 (1972).

[16] *Harter Equipment Co.*, 280 NLRB 597 (1986), denying rev. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

[17] *Birkenwald Distributing Co.*, 282 NLRB 954 (1987).

[18] *NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957); *Acme Markets*, 156 NLRB 1452 (1966).

[19] *Redway Carriers*, 310 NLRB 1113 (1991).

work if they engaged in consumer boycott handbilling to protest negotiating demands over subcontracting of unit work. Subsequently, when the employees went ahead with the handbilling, the employer locked them out. In affirming the judge's conclusion that the lockout violated Section 8(a)(3) and (1), the Board held:

> In our view, an employer can ordinarily take economic action in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position. In the instant case, the Respondent locked out its employees and withdrew its offer of severance benefits in response to the economic action of the Union (handbilling in support of a consumer boycott). However, we are persuaded that the Respondent acted to punish the employees for their handbilling, rather than in support of its bargaining position.

Id. at 146. In support of this conclusion, the Board cited the fact—equally present here—that the respondent did not explain to the employees, at the time of the lockout, that acquiescence in the respondent's bargaining position could avert the lockout. Thus, as in this case, the evidence did not support a claim that the lockout was in support of any bargaining demands. Instead, the evidence showed that the Respondent acted out of hostility toward the employees' protected union activities. The same is true here.

By concluding that a respondent is justified in locking out employees in response to a lawful economic weapon wielded by the union, the majority short-circuits the *Great Dane* analysis and ignores clearly applicable Board precedent. See also *Riverside Cement Co.*, 296 NLRB 840, 842 (1989) ("the Respondent did not engage in this [lockout in response to concerted employee refusal to bring in their own "personal tools"] in order to support a legitimate bargaining position. The Respondent's actions were taken in response to the employees' decision through the Union to invoke the terms of the implemented proposal. As such, the Respondent engaged

in retaliation for the protected concerted activity engaged in by the employees."); *Carlson Roofing Co.*, 245 NLRB 13 (1979), enfd. on other grounds, 627 F.2d 77 (7th Cir.1980) (one-day lockout of all employees because some employees protested respondent's decision to send them out alone to do roofing repair work violated Section 8(a)(3) and (1) of the Act).[20]

In my view, use of the lockout in this case—where the record does not establish that its purpose was to "affect the outcome of the particular negotiations"[21]—carries with it a necessary implication that the employer was motivated by a desire to discourage union activities.[22] Coupled with the

---

[20] The majority seeks to distinguish these cases on grounds that were either not relied on by the Board or were not necessary to its holding. In *Riverside Cement*, 296 NLRB at 842, the Board relied on the fact that the lockout was instituted in retaliation for the protected activities of the employees. It did not even mention the factor cited by my colleagues in the majority, i.e., conduct by the respondent which was "inimical to the bargaining process." In *Highland Superstores*, 314 NLRB at 146, the Board did cite the fact that the respondent had threatened the employees with termination if they went through with their plans to engage in protected activity. But, it was the lockout in response to this activity, and not termination of the employees, that the Board found to be unlawful. The threat of termination was simply evidence that the Respondent "acted to punish the employees for their handbilling, rather than in support of its bargaining position." *Id.*

In this case, as detailed below, there is also ample evidence that the Respondent was acting in retaliation for the employees' protected inside game activities, and not in support of its bargaining position. The Board has never held that, under *Great Dane*, evidence of antiunion motivation for a lockout must be in the form of a threat to terminate, or even a violation of Sec. 8(a)(1). Antiunion motivation may be demonstrated, as in this case, by evidence that the employer was acting out of hostility toward the protected activities of its employees.

[21] *American Ship Building Co. v. NLRB*, supra 380 U.S. at 313.

[22] My colleagues in the majority recognize that a lockout is unlawful if it is either intended to "discourage union membership" or used "in the

affirmative evidence of antiunion motive, discussed below, the conclusion is warranted that this lockout was unlawful.

The majority nonetheless seems to presume that since a lockout may legitimately be used in anticipation of a strike, it may be used to counter an inside game that is used as an alternative to a strike. That premise is faulty, as the inside game is obviously quite different from a strike. At least as employed in this case, the strategy entailed no withholding of labor, no cessation of work, and no curtailment of operations. See *Riverside Cement Co.*, 296 NLRB 840, 842 (1989) (lockout in response to concerted employee refusal to bring in their own "personal tools" to protest respondent's implemented bargaining proposal; "[t]he employees who took this

---

service of designs inimical to the process of collective bargaining." *American Ship Building, supra*, 380 U.S. at 308, 312-313. They focus on the latter factor, however, dismissing it as not present in this case, and conveniently gloss over the former. It is well established that "union membership" which is not to be discouraged refers to more than the payment of dues and that measures taken to discourage participation in protected union activities may be found to come within the proscription. *American Ship Building*, 380 U.S. at 313. See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963); *Radio Officers Union v. NLRB*, 347 U.S. 17, 39-40 (1954).

In *American Ship Building*, while the Court held that the lockout was lawful, it stressed that the Board had not "remotely suggest[ed] that the company's decision to lay off its employees was based on union hostility." *Id.* at 305. There was no evidence and no finding that the employer was hostile to its employees' banding together "or that the lockout was designed to discipline them for doing so." 380 U.S. at 308. "There was not the slightest evidence and there was no finding that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which it was involved." Id. at 313. Certainly, the same can not be said here. There are ample findings by the judge and supporting evidence that the lockout was explicitly intended to "discourage" union activities and that, but for the inside game, the lockout would not have occurred. Coupled with statements of hostility by Respondent's officials toward the inside game, it is clear that the lockout falls within the category of lockouts intended to "discourage union membership."

action were not engaged in a refusal to work or a strike of any kind. Rather, they were at all times willing and available to work under the contract and the recently implemented final offer.") Thus, the operative or economic justifications for a lockout applicable in the strike situation do not automatically apply to the inside game.

My colleagues challenge my differentiation between the inside game and a strike as being irreconcilable with *dicta* in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In that case the Court considered federal preemption of state regulation of a group of employees' concerted refusal to work overtime while a new contract was being negotiated. After holding that the state was preempted from regulating such conduct, the Court volunteered that "even were the activity presented in the instant case 'protected' activity within the meaning of Section 7, economic weapons were available to counter the Union's refusal to work overtime, e.g., a lockout ... and the hiring of permanent replacements." *Id.* at 152-153. However, the Court simply did not have before it the issue before us today, whether a lockout in response to an "inside game" was lawful. It therefore did not have to engage in the *Great Dane* analysis, examine evidence of motivation or business justification, or even decide whether the conduct in question was protected. Yet, for the first time in the 22 years since the Supreme Court issued that decision, the Board majority today relies on that quoted dicta to support their otherwise questionable conclusion that a lockout may be used for the sole purpose of pressuring employees to give up protected activities that do not constitute a strike. Neither the Board nor any court has ever applied this dicta.[23] And, while I adhere

[23] In fact, the Board and the courts have repeatedly acknowledged that the Court's statement that the hiring of permanent replacements was available to the employer, is not a dispositive statement of the law. See *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 769 (D.C.Cir.1988)

carefully to the words of the Supreme Court, I would not say that the quoted passage clearly indicates that a lockout in response to inside game activity would be lawful. Nor, in my view, does that passage invalidate the distinction between protected inside game activities and a strike.[24]

In short, the motive or purpose underlying a lockout is the critical factor in determining whether it violates Section 8(a)(3).[25] Section 8(a)(3) imposes on the Board the respons-

---

(hiring of permanent, as opposed to temporary, replacements after a lockout may be unlawful); *Johns- Manville Products Corp. v. NLRB*, 557 F.2d 1126, 1135 fn. 18 (5th Cir.1977), cert. denied 436 U.S. 956 (1978) ("Although we adhere carefully to the words of the Supreme Court we would not say at this time that the above statement clearly indicates whether the hiring of permanent replacements in the absence of a strike . . . would be a violation of the Act."); *Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989) (in representation proceeding, Board holds that locked out employees, and not their replacements, are eligible to vote because the locked out employees "were not, and could not lawfully be, permanently replaced.") Similarly, its statement that a lockout in response to a protected overtime boycott would be lawful cannot be accepted as any more dispositive.

[24] Indeed, the majority ignores clear Board precedent upholding that distinction. See, e.g., *Riverside Cement*. Following their logic, the majority would allow an employer to respond to any protected activities in support of a union's bargaining position by locking out its employees, whether or not the employer had a specific legitimate business justification, simply because there was an ongoing bargaining dispute. Thus, for example, if employees held regular rallies outside the plant on their spare time, in support of the Union's bargaining demands, and if the majority means what it says, the employer would be permitted to lock out the employees to pressure them to halt the rallies. I can therefore envision that the lockout, which will (given the universality of no strike/no lockout pledges) generally occur during negotiations, might too easily become a device disguised as an effort to protect the employer's bargaining position, for breaking a union.

[25] Developing Labor Law, 1130 (Patrick Hardin 3d ed. 1992). See, e.g., *Conagra, Inc.*, 321 NLRB 944, 962 (1996), enf. denied on other grounds 117 F.3d 1435 (D.C.Cir.1997); *Shenck Packing Co.*, 301 NLRB 487 (1991); *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237, 1258 (1989),

ibility to analyze a respondent's true motivation when a respondent is alleged to have taken discriminatory action against employees for engaging in union activities.[26] Fulfilling that responsibility does not make the Board an "arbiter of economic weapons." The Board's fundamental statutory responsibility to protect employees from retaliation for exercising rights protected by Section 7 precludes me from joining my colleagues in holding that this inside game was subject to counterattack by lockout.[27] I therefore conclude that the Respondent has failed to establish that the lockout had a legitimate business justification.

B. The Lockout Was Motivated By Animus Against Union Activity

Even assuming that the Respondent had met its burden of showing that it had a legitimate, business justification for the

---

enfd. sub nom. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C.Cir1991).

[26] *Radio Officers' Union v. NLRB*, 347 U.S. 17, 43 (1945) (the relevance of the motivation of the employer has been consistently recognized under Section 8(a)(3)); NLRB v. *Brown Food Store*, supra, 380 U.S. at 287 (the "real motive" of the employer in an alleged Section 8(a)(3) violation is decisive); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983) (the intention of Congress was to forbid those acts that are motivated by an antiunion animus).

[27] *In National Steel and Shipbuilding*, 324 NLRB No. 85 (Sept. 30, 1997), the Board panel unanimously held that the respondent engaged in unlawful surveillance when it videotaped rallies which employees were holding outside the plant gate as part of their "inside game." In contrast, the majority here holds that "group presentation of grievances was part and parcel of the inside game activity [and a]s such it remained subject to employer counterattack with the lockout weapon." Thus, my colleagues have sanctioned a lockout because employees have engaged in group presentation of grievances, while employer surveillance of similarly protected conduct is unlawful. That a lockout may be an economic weapon, and surveillance is not, does not justify these inconsistent results. I therefore cannot join my colleagues in sanctioning the use of a lockout to retaliate against the exercise of activities protected by Sec. 7 of the Act.

lockout, the next inquiry under *Great Dane* would be whether the General Counsel proved that the Respondent actually locked the employees out for antiunion reasons. In my view, the record evidence fully supports the judge's finding that the lockout was in fact motivated by animus against the employees' union activities.

On the first day of the lockout union officials asked Industrial Relations Manager Baughman why the Respondent took this action. Baughman explained that it was because of the inside game activities on behalf of the Union. In the best evidence of its motivation, the May 20 letter to employees, the Respondent's President stated that it had no alternative but to lockout the employees because of their "unacceptable" and "unwarranted" inside game. In one of its public announcements it said that "[r]ather than put up with a work slowdown, we decided to lockout [union represented employees]." (Emphasis added.)

About May 1, Industrial Relations Manager Baughman confronted Local 702 Business Representative Miller with the list of union-suggested inside game activities. Baughman declared that the Respondent "was not going to put up with this shit." This conversation occurred only in the first week of the inside game activity, before the Respondent could have had an opportunity to assess the impact of those activities on its business operations. Further, Baughman refused to target any specific item as an operational problem—as Miller requested—but denounced the list in its entirety. About ten days later, Baughman reacted angrily when he learned of the group grievances over the Newton sick leave policy. He told union representative Miller that he "wasn't going to put up with that, a bunch of people marching up to the superintendent's office to have a meeting." Any possible ambiguity was removed the following day when Baughman unequivocally vowed to Miller that he was "not going to tolerate these mass grievance meetings."

These separate incidents involving Baughman, the Respondent's highest ranking manager for industrial relations and principal spokesman in the contract negotiations, are not indicative of "inchoate" animus, as the majority maintains, but rather demonstrate active hostility towards this union activity. The conduct was not a reasoned response to the inside game, but rather anger.

Further, with regard to the group presentation of grievances, in the May 20 letter, Greenwalt explicitly cited employee refusals to furnish sick leave information as one of the "events of the last few weeks" which triggered the lockout. Manager Baughman testified that the refusal to furnish this information was specified because the employees, as a group, were protesting the sick leave forms.[28] Yet, the sick leave dispute had been settled by the time the lockout began on May 20. Citing it as a reason for the lockout reveals that the Respondent was still angry and thus demonstrates its animus.

Significantly, the judge found that in prelockout discussions the Respondent was disappointed and angry that the Unions did not strike but instead chose alternative strategies. Manager Patterson testified that the Respondent's highest ranking officials expressed anger during a May 11 meeting—9 days before the lockout was announced-that the unit employees "were getting the best of both worlds" by "putting pressure on the Company while still getting their pay check for the day time work." The Respondent's field management and supervisory personnel, as well as top officials, expressed similar views.

These highlights from the record provide direct evidence of animus on the part of top company officials responsible for

---

[28] The judge's finding that the group presentation of this grievance was protected concerted activity is clearly correct, and the Respondent has not excepted to it.

the lockout decision.[29] As set forth, the Respondent itself has explained that it locked out its employees in order to stop their "inside game." There is no credible evidence to support a claim that it targeted those activities for any legitimate, business-related reason. Thus, all we are left with to explain why the Respondent wished to stop the inside game are the statements of the Respondent's own officials, expressing hostility toward the employees' conduct. In my view, the only reasonable conclusion to be drawn from this evidence is that the Respondent locked out the employees in order to retaliate and cause them to end the inside game, simply because it was hostile to their engaging in those statutorily protected, concerted activities on behalf of the Unions. There can be no clearer basis for finding that the lockout was unlawfully motivated, and thus I would conclude that the Respondent violated Section 8(a)(3) and (1) by locking out its employees.[30]

I respectfully dissent.

Dated, Washington, D.C. August 27, 1998
Wilma B. Liebman, Member
NATIONAL LABOR RELATIONS BOARD

---

[29] The majority relies on *NLRB v. Wire Products Mfg. Corp.* in finding that animus is not established here. The Seventh Circuit held in that case that statements of the respondent's officials could not establish animus because the respondent had vested its attorneys with all bargaining, authority including the decision to lockout, and the attorneys displayed no improper motivation. The animus finding here, in contrast, is specifically premised on statements and conduct of the Respondent's highest ranking officials who were directly responsible for making the decision to lockout.

[30] Even assuming the majority is correct that the Respondent also had a legitimate business reason for the lockout, it still violated the Act under settled Board law. "An employer may have a dual purpose in locking out employees, but the fact that one of those motives is legitimate does not prevent a finding that the other is unlawful under the Act." *Conagra, Inc.*, supra, 321 NLRB at 963 fn. 34, citing *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962 (4th Cir.1977), cert. denied 434 U.S. 826 (1977).

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively in good faith with Local 702 as the exclusive representative of our employees in the Newton, Southern, Western and Eastern Units, by failing or refusing to promptly furnish Local 702 with information which is relevant and necessary to its function as such representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL make employees whole for any losses incurred as a result of the suspension of health insurance benefits and supplemental workers' compensation payments from the date such benefits and payments were suspended until the date they were resumed.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Peoria and Springfield, Illinois, on 36 days during the period from October 24, 1994, through

April 25, 1995. The charge and amended charge in Case 33-CA-10238, and the charge in Case 33-CA- 10266, were filed respectively on May 26, November 29, and June 24, 1993, by Local 702, International Brotherhood of Electrical Workers, AFL-CIO (Local 702). The charge in Case 33-CA-10449 was filed on November 9, 1993, by International Union of Operating Engineers Local 148, AFL-CIO (Local 148).[31] (Local 702 and Local 148 are sometimes referred to collectively as the Unions). The amended consolidated complaint that issued on September 1, 1994, and was further amended on September 23, 1994, and at the hearing, alleges that Central Illinois Public Service Company (the Company or Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The Company's answer denies the commission of the alleged unfair labor practices labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. The General Counsel, Local 702, Local 148, and the Company each filed a brief. On the entire record,[32] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the parties, I make the following

FINDING OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, an Illinois corporation with its principal office and place of business in Springfield, Illinois, is a public utility, and has been engaged in the business of generating and distributing electricity and gas. In the operation of its business the Company annually derives gross revenues in

---

[31] All dates are for 1993 unless otherwise indicated.

[32] By ruling and order dated November 1, 1995, I corrected the official transcript of proceedings in several respects.

excess of $250,000, and annually purchases and receives at its Illinois facilities, goods valued in excess of $50,000 directly from points outside of Illinois. The Company admits and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Unions are labor organizations within the meaning of Section 2(5) of the Act.

III. AN OVERVIEW OF THE COMPANY'S OPERATIONAL STRUCTURE, AND THE BARGAINING UNITS INVOLVED

The Company furnishes electric and natural gas services to the public in 66 predominately small town and rural counties in the Central and southern portions of Illinois, covering more than 20,000 square miles. The Company's overall operations for the transmission and delivery of electric and natural gas services are divided into three gas graphically defined divisions: The Eastern Division; the Southern Division; and the Western Division. The divisions are divided into areas, most division are divided into districts, and some areas have subdistricts. The Company also operates five power stations to generate electric power at the following Illinois locations: Newton, Coffeen, Meredosia, Hutsonville, and Grand Tower.

Local 702 is and has been at all times material, the designated exclusive collective-bargaining representative of the Company's employees in four appropriate bargaining units, covering respectively, the Eastern Division, Southern Division, Western Division, and Newton Power Station. Each unit comprises all operations and maintenance employees, excluding all employees, represented by other labor organizations, guards, professional employees, office clerical employees, supervisors within the meaning of the Act, and all other employees. The Southern Division unit also included (with the indicated exceptions), all employees employed in the production department of the Company's Grand Tower

Power Plants. (The Local 702 organizing units are herein respectively referred to as the Eastern unit, Southern unit Western unit, and Newton unit).

Local 702 represents nearly 1000 company employees. The Eastern unit about 300 unit employees, has been represented by Local 702 since about 1944. The Southern unit, with about 185 unit employees, including some 12 workers in the production department at the Grand Tower Power Station, has been represented by Local 702 since about 1917. The Western unit, with about 274 unit employees, has been represented by Local 702 since about 1971. The Newton unit, with about 190 unit employees, has been represented by Local 702 since about 1977.

The Company and Local 702 have been parties to successive collective-bargaining contracts, covering the respective units. The parties have customarily engaged in joint simultaneous bargaining reorganizing the three division contracts and the major issues with respect to the Newton contract, while entering into separate contracts for each unit the last contracts prior to the chain of events which led to this proceeding, were effective by their terms from July 1, 1989 through June 30, 1992.

Since 1970 (and at Meredosia since 1980), Local 148 has been, and is, the designated exclusive collective-bargaining representative of the Company's employees in a single multi-plant unit, with about 490 employees, including production and maintenance employees at the Coffeen, Meredosia, Hutsonville, and Grand Tower Power Stations, as set forth in separate contracts covering each facility. There are about 230 unit employees at Coffeen, 120 at Meredosia, and 90 each at Hutsonville and Grand Tower.

The Company and Local 148 customarily negotiate a single collective-bargaining agreement covering the unit employees. However, in the interests of convenience, they print separate

contract pamphlets for each facility. The last contracts prior to the events which led to this proceeding, were affective by their terms concurrently with the Local 702 contracts, i.e., from July 1, 1989 through June 30, 1992.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Complaint Allegations

The complaint alleges in sum, that the Company (1) from May 20 to August 25, 1993, locked out all employees in the Local 702 units; (2) during the same period, failed to make payments which were supplementing to workers' compensation payments to unit employees who were on workers' compensation leave at the time of the lockout, when their entitlements to such benefits has already accrued; and (3) about May 20, terminated the health insurance coverage of the unit employees, effective May 20, when entitlements to such benefits had already accrued of the full week ending May 22.[33] The complaint alleges that the Company engaged in the foregoing conduct because some of the employees in the Local 702 units engaged in protected concerted and union activities (including not working nonmandatory overtime, participating in work-to-rule actions, and adhering strictly sick leave information procedure agreed upon by, the Company) and to discourage employees from engaging in such activities. The complaint alleges that the Company thereby violated Section 8(a)(1) and (3) of the Act.

---

[33] I do not agree with the Company's assertion (Br. at p. 214) that the General Counsel alleges that the Company unlawfully terminated health insurance coverage only for the week ending May 22. The General Counsel contends, in sum, that such termination was unlawful even if the lockout was lawful, and that the termination may properly be considered as evidence of an unlawful motivation for the lockout. If the lockout was unlawful, then, as part of an appropriate remedy, the unit employees would be entitled to compensation for any lost health insurance benefits during or as a result of the lockout.

The complaint further alleges that since March 15, the Company has violated Section 8(a)(1) and (5) by failing to furnish Local 702 with information concerning subcontract at the Newton Power Station, which information was assertedly relevant to outstanding grievances. The complaint also alleges that from June 11 to December 1, the Company also violates Section 8(a)(1) and (5) by failing and refusing to furnish the Union in timely fashion, with information as to the amount of power purchased by the Company from other suppliers since May 20.

The complaint additionally alleges that from May 20 through June 21, the Company violated Section 8(a)(1), (3), and (5) by locking out all the employees in the Local 148 unit. The complaint engaged in such conduct because of its belief that the unit employees engaged in protected concerted activities (including not working nonmandatory overtime and participating in a work-to- rule action), and because some of the unit employees engaged in protected concerted and union activities (including not working nonmandatory overtime).

The principal and ultimate issues in this case are whether the respective lockouts were unlawful. As will be discussed, disposition of these issues entails consideration of several major factual questions in dispute.

B. An Overview of Developments Culminating in the Lockouts

In April 1992, the Company and Local 702 began negotiations for new collective-bargaining contracts, to succeed their 1989-1992 contracts. On July 10, 1992, negotiations ended, as the Company and Local 702 believed they had agreed on the terms and conditions of successor contracts, subject to rectification by Local 702's membership. On July 24, 1992, Local 702 advised the Company that its membership voted to ratify the agreement.

Beginning in July, the Company and Local 702 conducted themselves according to those terms and conditions they had

just negotiated. However, the 1992 agreements were not immediately reduced to writing, in as much as the parties still had to work out the specific language of all additions and changes.

In November 1992, a dispute arose as to what had been agreed on between Local 702 and the Company concerning the splitting of the premium costs associated with the medical plan applicable to the Local 702 bargaining units. The amount in dispute was substantial. Local 702 understood that effective January 1, 1993, the employee monthly contribution for family coverage would be $75. The Company informed Local 702 that the contribution would be $179 per month.

In December 1992, Local 702 and the Company each filed unfair labor practices charges, alleging that the other unlawfully refused to sign negotiated labor agreements. In January 1993, Board Region 14 declined to proceed on the charges, because there was "no meeting of the minds" on the matter of health insurance premiums. On March 10, the Board's General Counsel sustained Region 15's disposition of the charges.

Meanwhile, in January 1993, Local 702 and the Company resumed contract negotiations. The parties agreed to a series of short-term extensions of the terms and conditions agreed to in July 1992. The last extension expired on April 24, 1993.

During the first 3 months of 1993, Local 702 and the Company met in seven formal negotiating sessions. At the March 18 session, the Company presented "final" contract proposals. The Union presented a counterproposal. The parties met again on March 19, without reaching agreement. Thereafter, the parties did not meet in formal negotiations until May 7.

During the week of April 19, Local 702 conducted membership meetings for the division on Newton employees. The purpose of these meetings was two fold: (1) to decide and

vote upon whether to accept or reject the Company's "final" offer; and (2) if (as anticipated) the membership rejected the Company proposal, to decide upon the course of action they should take.

Local 702 Business Representatives Daniel Miller and Gary Roan were the principal speakers at the meetings. Miller assumes this position in early 1991, and was Local 702's Chief spokesman in the 1992-1993 negotiations. Roan had not been involved in the negotiations or in servicing the unit employees. However, he was regarded as knowledgeable concerning alternative strategies.

Miller spoke principally about the contract issues. Roan addressed the matter of alternative strategies. Local 702's leadership recommended rejection of the company proposal, and proceeded on the premise that the membership would vote accordingly. I shall, at a later point in this decision, address the discussions concerning contract issues. At this point, I shall address the matter of alternative strategies.

The General Counsel witnesses, including Miller and Roan, testified in sum as follows: Roan said that if they rejected the Company's proposal, the employees had three alternative courses of action. They could do nothing, beyond awaiting the course of further negotiations; they could strike; or they could play the "inside game."

Local 702 had obtained strike authorization, which was standard procedure on expiration of a contract. The union leadership recommended against a strike, because they believed that the Company would simply hire replacements.

Roan strongly recommended the inside game strategy, which he had previously discussed with, Local 702's leadership, officers, and stewards. The employees would remain at work. However, they would pursue a course of action which could include refusal of voluntary overtime, working strictly to safety and other rules, wearing arm bands,

informational picketing (during nonworking time) reporting to work exactly on time (instead of earlier), and not making decisions for supervisors. Roan asked whether overtime was voluntary, and the employees responded that it was voluntary.

Roan said that he had been successful elsewhere in using the inside game strategy. He said that an overtime boycott would keep the Company busy. The union leadership opined that the strategy could bring the Company back to the bargaining table. Roan said that for the strategy to be effective, all of the employees would have to participate. He cautioned that they would have to do prior work in a workmanlike and safe manner. Roan said that working to the rule would have an additional advent. As the employees would be working without a contract, they would not be able to utilize a grievance or arbitration procedure, if they were discipline for failure to follow rules.

Some employees asked about parking their trucks (as will be discussed, the Company permitted some employees to take their truck home with them). Roan answered that if they were not taking overtime calls, they should park their trucks (i.e., at the company facility), to make the trucks available for supervisors.

Roan said that without a contract, the Company might lockout the employees. He opined that this would be unlikely, because the Company was a public utility; and illegal, because the employees would be engaged in protected activities. He further opined that the employees would be eligible for unemployment compensation.

Two votes were taken at the Local 702 meetings. One was a secret-ballot vote on whether to accept or reject the Company's contract offer. The ballots were subsequently posted and counted at the end of the week. The employees voted by a margin of about seven to one to reject the Company's offer. The other vote, by open show of hands, was on alternative strategies.

At the meetings, Local 702 conducted a discussion of the alternative, strategies. A few employees spoke in favor of a strike, but most indicated their opposition. The employees voted overwhelmingly in favor of the inside game, if they rejected the Company's offer. Roan testified that the union leadership told the members that if the leaders found that the inside game strategy was not working, they would call special membership meetings to decide when to strike.

On Friday, April 23, Business Representative Miller telephoned Charles Baughman, the Company's manager for industrial relations. Baughman was the Company's principal spokesman in the contract negotiations with both Unions. Miller informed Baughman that Local 702's membership had overwhelmingly rejected the Company's contract proposal. Miller refused to agree to any further contract extension. He asked if the employees could work without a contract. Baughman said they could, and Miller said they would do so. Baughman asked if there would be a strike. Baughman agreed to do so. Baughman promptly sent such letters to both Unions.

Meanwhile, Local 148 had been engaged in contract negotiations with the Company since April 1992. Unlike the situation with Local 702, the parties had not even reached a tentative agreement. On March 25, 1993, the Company presented a proposed "final" contract offer.

Donald Giljum is Local 148 business manager, and was the Union's chief spokesman in the 1992-1993 contract negotiations. During the week of April 12, Local 148 conducted meetings of the unit employees, at which Giljum spoke. The employees voted to reject the company proposal and to authorize a strike. However, Giljum recommended against a strike, except as a last resort. He said that a strike would probably be ineffective, because the Company could hire replacements, and obtain power for other companies.

Giljum also discussed alternative strategies, and specifically, "inside game" tactics. He discussed such tactics as wearing black arm bands, rallies, protest letters, strict observance of safety rules, and notice to regulatory agencies (OSHA and EPA) of employees' concerns. There was no discussion of an overtime boycott at this time. The evidence fails to indicate that any formal vote was taken at the meetings. However, as will be discussed subsequent developments indicate that Local 148 did in fact embark on an inside game strategy after April 24.

Meanwhile, the Unions had been consulting together. On March 19, they met and discussed the situation. They discussed their respective contract issues. Giljum said that any strike would have to be short and well timed. He expressed concern that striking employees could be permanently replaced. He proposed that the Unions, jointly attend a company stockholders meeting, in order to protest the Company's bargaining position. The Unions agreed to honor each other's picket lines.

On March 26, Giljum agreed with the Company to extend the terms of the expired contract to April 24. Giljum knew that Local 702 had agreed to such extension, and took that factor into consideration in fixing the same date.

On April 16, Local 148 Business Representative Les Mooney informed Manager Baughman that the Union's membership rejected the Company's contract proposal, and took a strike vote. On April 22, Baughman met with Giljum, who refused to extend contract terms beyond April 24. Giljum said he would discuss the situation with Local 702. Baughman asked if Local 148 would strike. Giljum said that Local 148 would give 24-hour notice before striking. This was consistent with past practice, under which, upon contract expiration, the Company requested and Local 148 agreed to give such notice.

On April 23, the Unions again met to discuss the situation. Their bargaining committees discussed the possibility of coordinated bargaining. They concluded that it was too late to pursue such a course, and that each Union should pursue its own contracts. Local 702 said that it did not intend to strike. Local 148 indicated that it probably would not strike. They discussed alternative tactics, including refusal of overtime work.

After the Local 702 representatives left the meeting, Coffeen Chief Steward Dan Sweet told the other Local 148 representatives that the would initiate an overtime boycott at Coffeen (largest of the Local 148 represented facilities), except when the Company was contractually required to fill position (if necessary, through overtime). The next day, Sweet so informed the Coffeen stewards, who verbally notified the other employees.

On May 11, the Coffeen Power Station employees met to discuss strategy. They voted unanimously to refuse overtime, except when the Company was contractually obligated to fill Dupont shift vacancies. They also discussed, but did not vote on other tactics, including wearing of arm bands, strict observance of safety rules, and asking questions of supervisors.

In and about the second week of May, Giljum reported to Local 148 membership meetings concerning the status of negotiations and "job actions we are using to disrupt the working" of the Company.[34] Giljum testified that he was referring to wearing of black arm bands, employees assembling and going to work in a group, and at Coffeen, refusing overtime work unless (in the Union's view) such overtime was mandatory.

---

[34] Giljum testified that he did not recall using the phrase "job actions." However, minutes of the meetings indicate that he did refer to "job actions."

It is undisputed that during the period from April 24 to May 20, employees in the Local 702 units engaged in concerted and union activities, including not working overtime and work-to-rule actions. It is also undisputed that during the same period employees in the Local 148 unit engaged in concerted and union activities, including not working overtime. The nature and extent of those activities will be discussed at later points in this decision.

During the period from March 19 to May 26, Local 702 and the Company had only one formal negotiating session, which took place on May 7. Following the session, Baughman asked Dan Miller if Local 702 intended to strike. Miller answered that Local 702 had no present intention of striking, but was not giving up its options. Miller declined to agree to give 24-hour notice before striking. However, he promised that the unit employees would not abandon equipment, and that Local 702 would give sufficient notice to enable supervisory personnel to take over operations. Baughman asked how the Company would know that Local 702 was striking. As before, Miller answered that they would know when they saw picket lines.

During the morning of Thursday, May 20, beginning at 4 a.m., the Company locked out all employees represented by the Unions. The lockout of employees in the Local 702 units continued until August 25. On June 14, the Company and Local 148 reached tentative agreement on the terms of a new contract. On June 17 and 18, Local 148's membership ratifies the new contract, which was signed by the parties on June 21. The Company announced that it was ending the lockout against Local 148, effective 3 p.m. on July 22. However, the unit employees chose to honor Local 702's picket lines. Consequently they were on strike until August 25.

On August 25, the Company announced that it was ending the lockout of the Local 702 units employees, although no agreement had been reached on new contracts. The employees

returned to work on August 28. Negotiations, which had continued during the lockout, thereafter continued until January 1994, when the parties reached agreement on new contracts. On January 28, 1994, Local 702's membership ratified the new contracts, which were effective by their terms, retroactively, from July 1, 1992, through June 30, 1995.

In determining whether the lockouts were unlawful, there are four major factual questions which require detailed consideration and resolution. They are: (1) Why did the Company lock out the employees represented by the Unions; (2) Did Local 702 engage in converted and union activities during the period from April 24 to May 20, for an object of forcing or requiring the Company to enter into a "hot cargo" agreement prohibited by Section 8(a) of the Act; (3) What was the nature and extent of concerted and union activities engaged in by the Unions and the employees, during that period; and (4) Was overtime mandatory or voluntary in the units, and if mandatory, to what extent?

In reaching the bottom line question of whether the lockouts were lawful, it is not possible to strictly compartmentalize the subsidiary factual and legal issues. Consideration of one issue will sometimes entail discussion of matters primarily concerning another issue. Also, consideration of a factual question will necessitate discussion of pertinent legal principles. However, at this point I shall proceed to address the four major factual questions, in the indicate order.

C. Why Did the Company Lock Out the Employees Represented by the Union

Clifford Greenwalt is company president and chief executive officer. Cornell Dodd is senior vice president for operations. Together with Manager Baughman, they

constitute the Company's top echelon with respect to labor relations.

Greenwalt made the ultimate decision to lock out the employees represented by the Unions. Dodd and Baughman were privy to that decision. Greenwalt testified in this proceeding as an adverse General Counsel witness. Dodd and Baughman testified as adverse General Counsel witnesses and as company witnesses. Together, their testimony reflects the Company's asserted reason or reasons for the lockouts.

Greenwealt testified in sum as follow: The Company locked out the employees because refusals to work overtime, work slowdowns, work-to-rule practices, and refusals to provide information to supervisors led to conditions wherein the Company could not continue to fulfill its obligations to its customers, including its obligation to provide emergency service. The Company also took into consideration that negotiations were not going forward, and that "the Union" would not agree to contract extension or submission of the Company's last offer to a membership vote. The Company also considered its obligations as a utility. The Company feared that the Unions were trying to wear the Company down, and would call a strike if there was a storm or major outage (which would required substantial overtime emergency work). Greenwalt, in his testimony, gave no other reasons for the lockout. He testified that the Company did not lock out the employees, in order to stop the overtime refusals or work-to-rule practices.

Baughman, in his testimony, echoed in part the testimony of Greenwalt. He testified, in sum, that overtime refusal and work-to-rule practices were wearing down the Company's supervisory staff and salaried personnel, and as testified by Greenwalt, that the Company feared a strike at a critical time. Baughman testified that he based his belief that there would be a strike, on newspaper articles on statements by union people. He testified that the lockout was not because of the

overtime refusals and work-to-rule practices, but because of the effect of such conduct. However, he testified that the Company used the lockout as means to normal operations.

Baughman added that there were flareups at the Newton (Local 702) facility, and employee refusals to give information to supervisors. Specifically, this referred to refusals to give information concerning the nature of their condition, when calling in sick.

Baughman also advanced a reason for the lockout, which was not given as a reason by any other company witness. Baughman testified that the lockout was in part because Local 702 proffered an illegal subcontracting clause.

Vice President Dodd, in his testimony, gave an additional reason for the lockout. Dodd testified that the Company's goal was to get a contract.

Baughman (in the greatest detail), Greenwalt, Dodd, Western Division Manager Robert Patterson, and Eastern Division Manager Jack Herren testified concerning the company decision process which led to the lockouts. Of necessity, their description was in part incomplete. The Company objected, and sustained the objection, to questions concerning the opinions and advice given by Company Counsel Stuart Cohen. However, this does not preclude me from drawing inferences, based on the evidence, concerning Cohen's input into the decision.

Baughman testified in sum as follows: The Company, in consultation with Attorney Cohen, began discussing the possibility of a lockout as early as April 15. There were at least four meetings at which a lockout was discussed.

Baughman went on to testify in sum as follows: On May 11, there was a top level management meeting to discuss what course of action the Company should take in light of the inside game conditions. Present were Greenwalt, Dodd,

Baughman, Attorney Cohen, Company Vice Presidents Gil Moorman, William Morgan, and William Koertner, and Division Manager Patterson and Herren. No managerial personnel from the Local 148-represented facilities were present.

Baughman further testified in sum as follows: He made a presentation on the status of negotiations. Managers Patterson and Herren reported on conditions in their respective division.[35] They said that overtime refusals were wearing down the salaried personnel. They expressed concern that a major storm could precipated a strike in which event the Company would be vulnerable. Vice President Moormon expressed concern about the power stations, and of missing parts at Coffeen.

Baughman went on to testify in sum as follows: They discussed the Company's options. These were (1) implement the Company's final offer, (2) give Local 702 what it wanted, (3) discipline the employees, (4) do nothing (beyond continuing negotiations), and (5) institute a lockout. They rejected the first alternative, as this would gain nothing. They summarily rejected the second alternative. They rejected the third alternative, because discipline could result in discharge of good employees. They also considered that discipline was inappropriate, because the employees were engaging in union inspired, rather than individual actions.

Baughman further testified in sum as follows: They concluded that only the fourth and fifth alternatives were viable options. Initially, they discussed a lockout only with respect to Local 702. However, they concluded that if lockout occurred, both Unions should be locked out. They believed that Local 148 would honor Local 702 picket lines at the power plants, but that in the interim, there would be

---

[35] Then Southern Division Manager G.B. Fritz was unable to get to Springfield in time to attend the meeting.

opportunity for sabotage. Baughman also opined that the Unions were working together. No decision was made at the meeting. Following the meeting, President Greenwalt informed a few top headquarters officials, including Baughman, that he decided upon a lockout. Greenwalt explained that he did so because he was convinced that (1) the Company could not service its customers in the way they were entitled to be serviced, and (2) if there was a major storm, Local 702 would strike and leave the Company vulnerable. He directed that there should not be a lockout if (1) negotiating meetings were scheduled, (2) the Unions agreed to submit the Company's last proposals to this respective memberships, or (3) the Unions agreed to extend their respective contracts.

Baughman additionally testified in sum as follows: He suggested that the lockout commence on Saturday, May 15. However, Vice President Moorman expressed concern, because a large piece of Coffeen equipment was being repaired away from the plant, and Moorman wanted it back before the lockout. Also, Business Manager Giljum requested another meeting. By May 19, the equipment was back to Coffeen, and on May 18 negotiating session with Local 148 failed to result in agreement on a contract. No further negotiating sessions were scheduled with either Union. On May 19, Baughman reported to President Greenwalt that none of the conditions for avoiding or deferring a lockout were present, and that employees were still refusing overtime. Greenwalt directed that the lockout commence the next morning.

At 10 p.m. May 19, Baughman notified Vice President Koertner of Greenwalts' decision. Koertner then notified the division managers. Subordinate supervisors were notified the following morning. Unless needed on duty, most were notified after the lockout commenced.

For the reasons which I shall not proceed to discuss, I do not credit the various explanations of Greenwalt, Dodd, and Baughman for the lockout. I find that the Company locked out all units in reprisal for the inside game actions, including overtime refusals, regardless of whether such actions constituted protected concerted or union activity, and in a determines effort to stop those actions.

First, the explanations were in significant respects, contradictory or internally inconsistent. As indicted, only Baughman testified that Local 702's alleged proffer of an illegal subcontracting clause, had any relations to the Company's decision. President Greenwalt, who made the ultimate decision, testified that the matter had nothing to do with his decision. None of the witnesses testified that the alleged proposal was even mentioned in the various meetings which culminated in his decision.

As indicated, Baughman testified at one point that the Company did not lock out the employees in order to stop the overtime refusals or work-to-rule practices; and at another point, that the Company used the lockout as a means to return to normal operations. The explanations are inconsistent. Baughman admitted in his testimony that in the company meetings, the main concern was the overtime refusals, and that absent such refusals in the Local 702 units, there probably would have been no lockout. Indeed, it is evident from the testimony of the three company officials, that the inside game activities, in particular, the overtime refusals, were the catalyst for serious consideration of a lockout, and the overriding concern which led to Greenwalt's decision.

Second, the Company's asserted explanations for the lockout were inconsistent with the Company's statements to the employees, the Unions, and the general public concerning the lockout, until a public statement issued by Greenwalt on July 23. As will be discussed, the timing of that statement is significant.

On May 20, the first day of the lockout, Company President Greenwalt addressed letters, respectively, to the employees represented by each Union. Greenwalt asserted that he had no alternative but to order the lockout, "[b]ased on the events of the last few weeks." Greenwalt defined these events as "[consistent] refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel." He declared: "these conditions are neither acceptable nor warranted."

With each letter, Greenwalt attached an analysis of the Company's respective contract proposals. In the text of his letter, he discussed the source of the respective negotiations. Greenwalt asserted that Local 702 refused to submit its May 7 modified find offer to its membership "the work slowdown intensified," and "[t]hese developments have led me to authorize this lockout." However, Greenwalt did not assert that the lockout was intended to facilitate negotiations or get a contract or that Local 702 proffered an illegal subcontracting clause, or that the Company anticipated a possible strike.

By letter dated May 21, to Greenwalt, Local 702 Business Manager James Moor asserted that the lockout was an unfair labor practice. Company Counsel Cohen responded in pertinent part, that Greenwalt, by his May 20 letter, simply informed the employees "of the reason for the lockout."

On the morning of May 20, Baughman spoke by telephone to Local 702 Business Representatives Gary Roan and Dan Miller. The union representatives asked why the employees were locked out. Baughman answered that it was because of the overtime refusals, work-to-rule practices, and refusals to furnish information to supervisors (sometimes referred to as the "three factors"). He said that the Company could not continue to operate their way. Baughman gave no other reasons.

With regard to overtime, Roan asked whether overtime was mandatory. Baughman answered that "its your work" and someone had to do it. With respect to work- to-rule, Baughman referred to checking trucks. With regard to refusing to furnish information, Baughman said that this referred to information on sick leave forms. Miller said he thought they had an agreement on this. Baughman admitted that they did.

That same morning, Baughman also spoke to Local 148 Business Manager Giljum. Baughman said that he was not alleging sabotage, but that the Company could not continue to operate under the conditions of the past few weeks.

In press releases and correspondence, the Company continued to assert that it locked out employees because of the three factors, or two of them (overtime refusals and work-to-rule practices). These included a June 11 special bulletin to all employees. The Company sometimes referred to work slowdowns, coupled with overtime refusals, as in a May 20 news release, the Company's monthly publication for May, a July 14 bulletin distributed to employees, a report to stockholders, a letter from Greenwalt to United States Senator Simon, and correspondence from Greenwalt, responding to inquires from spouses of employees. The Company did not, in these communication assert that the lockout was intended to facilitate negotiations to get a contract, or because Local 702 proffered an illegal subcontracting clause or because the Company anticipated a possible strike.

On June 2, following Local 702's initial unfair labor practice charge, Baughman gave an affidavit to the Board's Regional Office. As the charge was now under investigation, and Baughman was asked to give a confidential affidavit, he had no reason to withhold any lawful motivation which he would be reluctant to state publicly. Baughman was called upon to state candidly and fully, the Company's reason or reasons for the lockout. Nevertheless, Baughman said nothing

about Company concern over a possible strike, or sabotage in the Local 148 unit. Baughman stated that the Company "locked out its bargaining unit employees because such things as employees working to rule, employees' refusal to take and work overtime, refusal to supply information failure of Local 702 to agree to a contract extension, and Local 702's refusal to take back the modified offer for ratification." Baughman did not give as reasons, a general work slowdown, or proffer by Local 702 of an illegal subcontracting clause.

By letter dated July 23 to the press, Company President Greenwalt purported to state the Company's position. Greenwalt asserted that Local 702 threatened to strike, the union membership voted to authorize a strike, and the Company had good reason to believe the Local 702 would call a strike if a major emergency occurred. Greenwalt added that there also was no progress in bargaining. He asserted that, therefore, the Company had no choice but to lockout the employees.

Manager Baughman made similar assertions in a letter to the Company's salaried personnel, dated August 23. Baughman discussed the pending unfair labor practices. He stated that the Company had two avenues with regard to the lockout. The first was that the Local 702 unit employees engaged in a partial strike by overtime boycott and excessive work-to-rule practices, thus forcing the Company to begin the lockout. The second was that regardless of whether or not the employees' activities were proper, negotiations were deadlocked, and the Company expected a strike when a severe storm or other emergency situation developed.

Prior to July 22, the Company never said or even intimated to the public, the Union, the employees or the Board's Regional Office, any concern about a strike in the event of a major storm or other emergency.

In support of its asserted concern over a possible strike, the Company presented evidence concerning the only time Local 702 engaged in a strike against the Company in support of its contract demands. In July 1996, following expiration of contracts and failure of the parties to agree on new contracts, Local 702 commenced a strike against the Company. During the third week of the strike, a severe tornado struck the city of Canton, Illinois, knocking out power for the area. Local 702 temporarily suspended the strike, enabling the Company and its employees to restore power to certain critical facilities (hospital, nursing home, sewage, and water treatment plant). The employees then resumed the strike. However, most homes and businesses were still without power. The parties immediately resumed negotiations engaging in a 24-hour session. They reached tentative agreement on new contracts, substantially on Local 702's terms.

In further support of its assertion, the Company presented testimony concerning conversations with Local 702 representatives, and newspaper articles which came to the Company's attention. Western Division Manager Patterson testified that in early May, he told Dan Miller that "it appears you are trying to wear us down until a big blow like Canton," and then "hit the bricks." Miller answered to the effect of "isn't that what you would do?" Macomb (Western division) Area Operations Supervisor Bill Reynolds testified to conversations with two Local 702 stewards during the period April 24 to May 20. The stewards said that if there was a major storm, Local 702 would strike, to try to put pressure on the Company. Reynolds reported the conversations to Patterson. The Grand Tower Maintenance Supervisor Robert Frye testified that a Local 702 steward told him that the employees were getting ready for a strike. The Company presented in evidence, an evident picket roster, covering full days, i.e., which would not apply to Local 702's prelockout informational picketing. Testimony of witnesses indicates that

the roster was prepared by a member of Local 702's executive board, and distributed by stewards to employees at the Newton power plant, in late April or early May. The Company also presented in evidence, newspaper articles which came to the attention of top management. The articles, variously dated in late April and early May, discussed the labor relations situation, and preported to report statements by officials and stewards of the Unions. The substance of these reported statements was that the Union reserved the right to strike, or that a strike was possible. However, none of the representatives was quoted as saying that either Union intended to strike, or that a strike was probable.

President Greenwalt and Manager Baughman testified in sum as follows: They intentionally chose not to disclose their belief that the Unions were trying to wear down the supervisors, and would strike in the event of a major storm in other emergency. They did so because if the Company's view was known, the Unions would follow just such a course, by telling the employees to wait for a major storm, and then strike. They said nothing about possible sabotage in the Local 148 unit, as this would be insulting to the employees.

The Company's explanation for this asserted nondisclosure makes no sense. According to the company witnesses, they had reason to believe that the Unions were planning to strike in the event of an emergency situation. Therefore, by disclosure, the Company would not be saying anything that the Union did not already know, and were planning. Second, as the unit employees were locked out, there was no reason for nondisclosure. Baughman in his testimony suggested that upon disclosure, the employees might somehow return to work, resume their inside game activities, and go on strike when an emergency occurred. Baughman did not explain how the employees could return to work without company agreement. Moreover, this would not explain why the Company chose to publicizes its alleged motivation on July

23, while the lockout continued against Local 702, and the parties were still far from agreement on new contracts.

The Company's explanation with respect to Local 148, is inconsistent with the Company's own course of action. The Company requested and Local 148 agreed, that Local 148 would give 24-hour notice before striking, although the Company had no such agreement with Local 702. If the Company were concerned about possible sabotage in the Local 148 unit, then it is improbable that the Company would want the Local 148 employees to remain on duty at the Power Plants, during a period when Local 702 was on strike, and the Local 148 employees would be expected to strike, or honor Local 702's picket lines, upon expiration of the 24-hour grace period. Thereafter, if for no other reason, the Company's professed concern over possible sabotage is not credible.

In fact, the evidence demonstrates that the Company had learned its lesson from the 1975 strike. As will now be discussed, the record is replete with admissions by company witnesses and other evidence demonstrating that the Company (1) was well prepared for a strike, whether or not in an emergency situation, (2) welcomed or least preferred, that the Unions strike if unable to reach agreement with the Unions (as the Company well knew) chose to use inside game tactics instead of striking.

The parties stipulated that in the division, the Company had 178 operations related nonunit supervisors, professional, and other personnel, and 256 additional nonunit presumed normally unrelated to operations, including office and sales personnel. The Company also had supervisors and other nonunit personnel at the power plants. The Company additionally had a large pool of headquarters employees, based in Springfield. President Greenwalt testified that the Company had a total of about 2700 employees, including some 1200 nonunit personnel. Many were experienced, skilled, or knowledgeable in the performance of unit work.

Most were not. However, inexperienced personnel could be assigned to assist supervisors and other skilled personnel, or to perform work which required only minimal training, such as meter reading.

The Company had a well-prepared plan to counter a strike, under which it could swiftly transfer or reassign nonunit work, both in the division and power plant, with minimal or no disrupting to essential services. The Company made no secret of that fact. In its report to shareholders for the first quarter of 1993, the Company stated: "Should a work stoppage occur, we are prepared to continue to provide service to customers using supervisory and wage and salaried personnel." In an annual report published in March or April the Company stated its belief that "a work stoppage of limited duration would not have a?? material adverse effect on the Company's operations or financial results." As indicated, the Company assuredly believed that any strike would be "of limit duration," i.e., at a time of a major storm or other emergency.

Company officials and supervisory personnel, including the officials involved in the lockout decision, confirmed that the Company was well prepared with a plan to counter any strike. President Greenwalt testified that as of April, the Company had strike contingency plans to continue operations, and to move personnel into the divisions. Manager Baughman testified that at the May 11 headquarters meeting, they discussed the fact that if there was a strike, the Company was prepared to cover operations by dispatching nonunion personnel. On April 24, the Company informed the press that the Company had a strike contingency plan in place "which would allow us to continue operating with supervisory personnel."

Eastern Division Manager Herren testified that at the May 11 meeting, Vice President Moorman said that supervisors could operate the power plant. Quincy (Western division)

Area Superintendent Reginald Ankrom testified that the Company had a strike contingency plan, which was the same plan which it used driving the lockout. Southern Division Manager Fritz testified that if there were both a strike and a storm, he would focus the management personnel on the storm, as the Company did (successfully) during the lockout. Western Division Manager Patterson testified that on April 22, he met with other Western Division Management to discuss strategy for a possible strike. They worked out a plan for deployment of personnel, making maximum use of experienced personnel. Mattson (eastern division) Area Superintendent Roger Willis testified that prior to April 24, the Company had a contingency plan to cover work in the event of a sudden strike. He testified that he did not think his group was adequately prepared. However, Willis admitted that he so believed because he was not aware of the companywide plan.

The manner in which the Company implemented the lockout, and thereafter carried on operations, demonstrates that the Company was fully prepared and able to deal with a sudden strike, including even a strike coupled with emergency conditions. As indicated, only a few top headquarters officials knew that a lockout was imminent. Top field officials learned of the lockout on the evening of May 19, other supervisory and non-unit personnel received no advance notice.

Nevertheless, from the outset of the lockout, Company nonunion personnel performed all necessary unit work. President Greenwalt testified that he was satisfied the Company provided safe and reliable service during the lockout. The Illinois Commerce Commission after investigation, determines in sum that with the exception of minor problems, it agreed with Greenwalt's assessment. The Company did not even find it necessary to hire replacements, although there were many storms, including one major storm, during the lockout period.

Field management and supervisory personnel confirmed in their testimony, that the Company was well prepared to maintain operations during a units work stoppage, whether by reason of strike or lockout. Jerry Simpson, was a supervisor at Grand Tower, testified that prior to the lockout, the Company was stocking up on chemicals and other materials which required delivery. Manager Patterson testified that as of May 20, everyone knew where they were supposed to report, that within a couple of days, personnel were in place to take over the unit work, and the Company felt it could protect the public safety. Western Division Electric Operations Supervisor Steven Bradshaw testified that personnel were spread evenly throughout the western division, and he was "amazed" how well they did. Area Superintendent Willis testified that the Company sent people with some knowledge of the work, with others to assist, and unit work was handled throughout the lockout. Area Superintendent Ankrom testified that he did not have much experience, "but we learned quickly." At the Coffeen power plant, a scheduled (maintenance) outage, which commenced about March 1, was completed on June 2, only 2 days behind schedule.

Other evidence confirms that Local 148 was correct in its assessment that the Company could counter a strike in part by obtaining power from other utility companies. On July 20, Local 702 requested information concerning the Company's purchase of power during the lockout. As indicated, the Company's refusal to furnish information is the subject of one of the present unfair labor practices allegations. At this point it is sufficient to note that when (after the lockout), the Company released such information, the figures indicated that the Company substantially increased its purchases of power during the lockout.

Additional evidence demonstrates that the Company was not only well prepared for a sudden strike, but welcomed strike action, and was angry and frustrated when the Unions

opted for alternative strategies. Manager Patterson testified in sum, that at the May 11 top level meeting, the conferees express anger that the employees "were getting the best of both worlds" by "putting pressure on the Company while still getting their pay check for the day time work." Vice President Dodd testified that the Company preferred that the Unions strike, rather than resort overtime boycott and work-to-rule tactics.

Field management and supervisory personnel expressed similar views. Supervisor Bradshaw testified that he agreed with Patterson that the Company was better off with a strike or lockout, and that the superintendents indicated that they preferred a strike to an overtime boycott. Area Superintendent Willis testified that he was "disappointed," rather than angered by the inside game strategy, i.e, that he would have preferred a strike. He testified that he encouraged Manager Herren to recommend a lockout. Herren testified that he believed that the negotiations could be settled only by a strike, in which event the Company could implement its contingency plan. Superintendents McLeod and Linda Pecaut similarly testified, in sum, that the negotiations could be resolved by either a strike or lockout. Manager Fritz testified that having a work force for one- third of the day was probably worse than not having them at all, i.e., that he preferred a strike to the overtime boycott. Fritz further testified that he made clear to supervisors, that he wanted the overtime boycott stopped.

Moreover, the Company was well aware that Local 702 decided upon an inside game strategy as an alternative, and not as a preclude to a strike, because Local 702 believed that a strike would not be successful. In particular, the Company was immediately informed concerning the Local 702 meetings during the week of April 19, at which the decision was made.

On April 21, by internal company communication, known as "wiz mail," Macomb area Superintendent Jack Gumbel

reported to Manager Patterson that he got word that the employees were told not to take overtime after April 24. Gumbel asked whether this was true. Patterson relayed the message to other managers. Patterson responded that "it fits with what Herren had." Therefore, I do not credit Manager Herren's testimony that he did not recall hearing about inplant activities before April 24.

Manager Patterson testified that he heard that at ratification meetings, the employees voted to refuse overtime and to work to rule, that he so informed Baughman and Herren, and that they discussed the matter at a management meeting on April 22.

Manager Fritz testified that prior to April 24, he heard through the grapevine that the employees were planning an overtime boycott. Superintendent Ankrom, who received the April 21 communication, testified that he heard the employees voted to engage in inplant activities and overtime boycott.

Patterson testified with reference to union meetings, that "we usually know what feed was coming out of there." Local 702 Business Representative Roan testified that in late 1993, after the lockout. Baughman told him that "we know what goes on at your meetings," and "we have ways of finding out." Baughman did not deny his testimony. In light of Patterson's admission, I credit Roan.

In fact, the Company had potential sources of information concerning union meetings. Hundreds of employees attended the meetings during the week of April 19, including some who were related to management personnel. If, as indicated, the Company was informed about the decision to engage in overtime boycott and work-to-rule activities, then it follows that the Company was also in formed that Local 702 decided against a strike, notwithstanding protestations of lack of knowledge by some company witnesses.

Shortly after the Local 702 membership voted to engage in work-to-rule activities, Business Representative Miller prepared a list of list of suggested "work by the rule" activities. Copies of the list were passed to stewards for distribution at Local 702 meetings. The list included such matters as using flags and other warning devices on line work, plugging gas line disconnects, following all laws and company rules, doing exactly and only what told to do, asking precise questions of supervisors, presenting all grievances as a group, parking trucks at 5 p.m.. advising nonemployees to call in to report unsafe conditions, reporting all gas leaks, advising customers of their right to have their meters checked annually for accuracy, and their right to various information from the Company, reporting all injuries and seeking proper medical treatment, and not reporting to work when sick.

As will be further discussed, none of the suggestions violated company rules or policy. Some were required by law, or company or other safety rules. Prior to April 24, employees did not uniformly adhere to such rules and practices. The suggestion concerning parking trucks, referred to the fact that employees who normally took the trucks home, would not be taking overtime calls, and therefore should leave the trucks available to supervisors after 5 p.m. The list also suggested that employees take pride in their work, and do "perfect work."

About May 1, Manager Baughman confronted Miller with a copy of the list. He asked if Miller had seen the list. Miller admitted that he wrote it, asserting that he meant what he said. Baughman responded that the Company "was not going to put up with this shit." Miller asked if Baughman had a problem with any item. He said that if so, he would issue a memo stating that the Company instructed employees not to follow the pertinent rule. They discussed particular items. Baughman said that the Company was not going to operate this way, and he would not put out his name to any statement

that employees should not follow the rules. Baughman never told Miller or any other union representative that the employees should not follow any company or safety rule. Baughman also never complained to Local 702 that the employees were engaging in excessive work-to-rule practices, or a work slowdown. Baughman did complain to Miller about the overtime refusals, an asked if Miller could do anything. Miller answered that the Company must be having bad luck.

At the time Baughman spoke to Miller about the list of work by the rule practices, Local 702 was only in the first week of its inside game activities. The Company had not yet had an opportunity to assess the impact of those activities on its operations. Although Miller afforded Baughman an opportunity to criticize or complain about specific items on the list, he did not do so. Rather, he demanded the list in its entirety, asserting that the Company would not "put up with this shit." I find that Baughman's remarks demonstrate company animus toward the work-to-rule activities regardless of whether they were required or protected by law, or constituted protected concerted or union activities. His remarks constitute evidence of the Company's motivation for the lockout.

As indicated, the Company initially declared publicly and to the Unions, that the lockout was motivated in part by employee refusals to furnish information on sick leave forms. The evidence concerning this matter, further demonstrates company animus toward protected concerted employee activity.

In July 1992, as part of their tentative argument on a Newton contract, Local 702 and the Company included a provision in the sick leave article, that: "employees absent for any reason are required to provide the Company with a reason for their absence." Neither the expired 1989-1992 contract, nor the tentative division contracts, contained such a provision.

Pursuant to the agreement, on July 29, 1992, the Company commenced using a new off duty report form at Newton. The new procedure required that when employees who called off sick returned to work, they had to indicate on the form, the nature of illness, and whether the employee saw a doctor. The provision form required only that the employees check "personnel illness" as the reason for absence.

The Company continued to use the new form at Newton, with no evident problems, until the negotiating sessions of March 18 and 19. Dan Miller expressed concern to Baughman, that the new procedure appeared to violate the American with Disabilities Act (ADA), in that it lacked provision for confidentiality. The completed forms were not maintained in a secure place, and could be seen by unauthorized persons. Miller gave Baughman a summary of the pertinent ADA requirement. Baughman said he would check with company counsel. At the next session on May 7, Baughman said he would get back to Miller. However, he did not do so before a crisis arose at Newton.

On May 12, two Newton employees including the Local 702 unit chairman, upon returning to work after calling in sick, simply entered "sick" on their off duty forms. Operations Supervisor Robert Butler told them not report to work until they gave more detailed information.

The next morning, at about 6:45 a.m., a group of about 20 employees including stewards, requested and were granted a meeting with management to discuss the matter. They asked why they had to complete the forms. Butler invoked the July 1992 agreement. Plant Manager Bob Kennedy arrived at the meeting, and gave the same explanation. No witness testified that the employees left or neglected work to attend the meeting, or were ordered to return to work.

Kennedy and Business Representative Roan discussed the situation by telephone. They referred the problem to

Baughman and Miller. The two chief negotiators promptly reached a settlement in two conversations. They agreed that the two employees could return to work without loss of pay, and need not provide further information. They further agreed that for the time being, Newton employees who called off sick could on returning to work, simply note that they were "sick." As indicated, in their May 20 conversation concerning the lockout, Baughman confirmed that they had an agreement.[36]

However, in their first conversation on May 13, when Miller raised the matter of confidentiality, Baughman declared that he "wasn't going to put up with that, a bunch of people marching up to the superintendent's office to have a meeting." In their second conversation, Baughman reiterated the point, assessing that he was "not going to tolerate these mass grievance meetings." Miller replied that the employees were reluctant to meet alone concerning a disciplinary matter. Baughman testified that the Company mentioned the refusal to furnish information and a reason for the lockout, because the employees as a group were protesting the forms.

In light of Baughman's remarks and admission it is evident that the Company was less concerned with employee refusals to complete the new off duty report forms, than with the fact that the employees sought to present their grievance as a group. By May 20, the dispute had been resolved, but the Company nevertheless gave as a reason for the lockout, employee refusals to furnish information to supervisors. The inference is warranted, and I so find, that the Company was referring to its anger that the matter had been resolved because the employees chose to present this grievance in a group meeting.

The employee's actions constituted protected concerted activity under the Act. *Gullet Gin Co. v. NLRB*, 179 F.2d 499,

---

[36] On August 5, 1993, the Company and Local 702 reached agreement on a new contract provision dealing with the matter.

502 (5th Cir.1950), affd. in petinent part 340 U.S. 361 (1951). Although the Company and Local 702 had agreed to use the new forms, this did not excuse the Company from complying with the ADA, nor did it require the Company to suspend employees who refused to complete the form. As indicated, the suspension of the two employees was the catalyst which precipitated the grievance meeting. Assuming, arguendo, that the employees refrained from work or left work in a group to protest the Company's actions, then the employees were engaged in a statutory protected work stoppage. *NLRB v. Washington Aluminum Co.*, 379 U.S. 9 (1962). As the contract had expired, the no-strike clause was no longer in effect. In sum, I find that the matter evidences that by locking out the employees, the Company was motivated by animus toward concerted and union activities, regardless of whether the activities were protected under the Act.

The Company presented testimony by management and supervisory personnel to the effect that they were somehow better off during the lockout than during the inside game period. The explanations were that during the lockout, there was less mental or emotional stress, they felt in charge of the situation, they were relieved from supervisory duties, they knew what work they had to perform, and Springfield assigned additional personnel to help them. However, the same would be true in the event of a strike, which as indicated, the Company preferred.

In fact, the nonunits personnel worked longer and harder during the lockout then they did during the period from April 24 to May 20. President Greenwalt, Vice President Dodd, and other company witnesses so conceded as much in their testimony. Supervisors and other nonunit personnel routinely worked 12-hour days, and increasingly, 16-hour days. Sometimes they worked around the clock. At Newton, the staff lived at the facility, going home only occasionally. In a position statement to the Board's Regional Office, company

counsel stated: "It is true CIPS bore self imposed pressure on May 21 which was greater than the pressure it bore on May 19th." In sum, the Company did not institute the boycott in order to relieve pressure on its supervisors. Rather, the Company was willing to, and did, impose greater pressure on its nonunits personnel, in order to stop the overtime boycott and other inside game activity.

I do not credit Dodd's testimony that the Company locked out its employees as a means of getting a contract. As indicated, Greenwalt and Baughman testified that they chose not to disclose their alleged belief as to the Unions' strategy, because they feared that if they made known their belief, the Union would follow such strategy. However, if the Company secretly instituted a lockout in order to facilitate negotiations and reach agreement with the Unions, then the Company would have no reason, not even an arguable one, to conceal that purpose. Rather, declaration of such purpose would put the Company in a favorable light.

In its statements to the Unions, the employees, and the public, the Company was sending a message to the employees. Nowhere in that message did the Company say that it locked out the employees in order to get a contract. Rather, the Company said over and over again, that it locked out the employees because of the three factors of overtime boycott, work-to-rule practices and failure to furnish information to supervisors (of which the third matter had been resolved). The plain import of the Company's message was that it wanted a stop to such activity.

Moreover, the Company demonstrated driving the course of negotiations, that it was in no hurry to reach final agreement. It was the Company, and not the Unions, which repeatedly sought extensions of the existing tentative or expired agreements. The Company was willing to maintain the status quo indefinitely, so long as the Unions did not apply economic pressure without striking.

In the case of Local 148, the Company, by locking out the employees, frustrated rather than facilitated movement toward a contract. This aspect calls for discussion of the course of negotiations between the Company and Local 148.

Following rejection of the Company's "final" contract offer, the parties met in negotiations on April 22. At this point, the issues between the parties were: (1) the Company's proposal to remove seven jobs at Grand Tower from the bargaining unit, specifically, four engineers, the coal yard foreman, the head repairman, and the No. 5 relief man; (2) a company proposal to reduce sick leave; (3) company proposals on Medicare carve out and Medicare Part B premiums; and (4) Local 148 proposals on increased vacation, 401K matching funds, and a change in the pension plan with respect to the Local 148 proposals. The Company position was that increased benefits should be based on productivity, with respect to the Grand Tower jobs, Local 148 wanted monetary relief for effected employees if any of the jobs were removed from the unit.

In bargaining sessions on May 14, 17, and 18, the parties made substantial progress toward resolution of a contract. Local 148 did not pursue its proposals for increased benefits, and the Company did not pursue its proposal to reduce sick leave. The Company withdrew its proposal for Medicare carve out, and Local 148 agreed to the company proposal on Medicare Part B premiums. On May 17, Local 148 proposed to give up the four engineer jobs at Grand Tower, with wage protection for employees who were bumped or lost their jobs as a result of the removal, and retention of the other three jobs in the unit. The Company took Local 148's proposal under advisement.

The following day (May 18) the Company counterproposed to leave the coal yard foreman in the unit, and to provide a fund of $78,000 to compensate employees affected by removal of jobs from the unit. Local 148 rejected the

counterproposal. However, the parties recognized that the only remaining issues were placement of the head repairman and No. 5 reliefman, and wage protection for affected employees.

At this point in the session, there was a heated exchange concerning the Grand Tower situation. Giljum said that giving up four top paying jobs was a tough pill to swallow. Shelby Slusher, a member of Local 148's negotiating committee, commented that he would be eaten alive when he brought the matter to the membership. Members of the Local 148 committee directed accusations at Grand Tower Superintendent Jerry Simpson, who responded in kind. Baughman declared the session adjourned.

Following the formal session, chief negotiators Giljum and Baughman met with the Federal mediator. Giljum and Baughman each said that he had gone as far as he could go. However, it was not unusual for meetings to end with such declarations. In prior session, they were followed by movement at subsequent sessions. Heated exchanges were also not unusual at negotiating sessions. (The May 18 session was the 75th in their 1992-1993 negotiations.) Neither side said they were at impasse, or characterized their positions as final. The mediator said that "We should be able to work this out at our next meeting." Giljum rejected another session. Baughman said that he would get back to him. They did not at this time set a date for the next session.

Company Vice President Dodd, who was not present at the negotiations, testified that the parties were fairly close to agreement, but understood they were at impasse. However, Baughman testified that he did not say they were at impasse. Dan Sweet, a member of Local 148's bargaining committee, and General Counsel's principal witness concerning the negotiations, testified that there was no impasse. On May 20, the day of the lockout, Coffeen Plant Superintendent Howard Fowler, a member of the company negotiating team, told

Sweet and other employees that he was surprised at the lockout, he thought they were close to a contract, and that for the first time in weeks (after the May 18 session) he unpacked his suitcase.

The parties next met in negotiations on May 25. There was no substantive discussion. Instead, they argued about the lockout. Baughman said that the Company could not continue to operate this way, and referred to the overtime refusals. Giljum accused Baughman of bad faith, because the Company did not give Local 148 the same 24-hour notice that Local 148 promised before striking. He called Baughman a liar. Baughman promised that the Company would pay the employees for the first day of the lockout. They argued as to whether there had been work slowdowns at the power plants. However, they agreed that they had to resolve the Grand Tower issues.

On June 1, the parties resumed substantive discussions. At the next session on June 14, they reached tentative agreement on a new contract. They agreed to wage protection as proposed by the Company, the head repairman would be red circled, and when he retired, the No. 5 reliefman (whose job was ancillary to the head repairman) would become a senior mechanic in the unit, with a pay increase. As discussed, Local 148's membership ratified the new contract on June 17 and 18.

I find that there was no impasse in negotiations between the Company and the Local 148 as of May 18. Rather, as the parties themselves recognized, they were close to reaching agreement, and anticipated resolving the remaining issues (basically, two jobs in dispute) within one or two more sessions. Nevertheless, the Company chose to lock out the Local 148 unit employees, notwithstanding that it had good reason to believe (and correctly so), that the lockout would serve to frustrate the course of negotiations and delay resolution of a contract. Therefore, as indicated, I find that the

matter further demonstrates that the Company did not institute the lockout in order to facilitate negotiations or agreement on a contract.

On August 25, Baughman told Local 702 that the employees could return to work and do their jobs as before April 24, i.e., not engage in work-to-rule practices or refusals to work overtime. Baughman said that the Company hoped to get a contract during the lockout, but it didn't work, and there was no reason to keep the employees in the middle.[37]

The Company also informed its employees, and so stated publicly, that it expected them to return to work and perform their duties in the same manner as they did before April 24. Baughman testified that after the lockout ended, the Company decided to discipline employees for overtime refusal. Baughman and Dodd testified in sum, that after the lockout, fewer employees refused overtime or engaged in work-to-rule practices, and that some employees were disciplined for refusing overtime work.

As discussed, the Company did not initiate or continue the lockout in order to get a contract. It follows that the Company did not end the lockout because it failed to achieve that nonexistent goal. I further find that the Company did not end the lockout because it abandoned its goal of stopping the inside game practices. The Company made clear to Local 702 that it was still determined to stop the overtime boycott and work-to-rule practices. Rather, the Company changed its strategy because of developments in the pending unfair labor practices case.

Company Counsel Cohen was an active participant in the meetings which culminated in the lockout decision. The

---

[37] Vice President Dodd testified that the Company decided to end the lockout because it had not achieved a contract, and the Company was concerned about the economics of the employees.

participants considered and discussed such aspects as defensive and offensive lockouts and the legality of a lockout in the extant circumstances. It is evident that President Greenwalt considered and relied upon Cohen's advice in deciding upon a lockout.

On July 21, the Board's Regional Office informed the Company that it had submitted Local 702's charge for advice from the Office of General Counsel. On August 20, the Division of Advice remanded the matter to the Region for an investigative determination as to whether overtime was mandatory. The Company referred to both developments in its August 23 letter to salaried personnel concerning the litigation.

Immediately upon learning that the case had been submitted for advice, the Company changed its explanation for the lock out. On July 22, the Company, for the first time, proposed that Local 702 give 10-day notice before striking. The following day, for the first time, the Company publicly asserted that it locked out the employees because it feared that Local 702 would call a strike in the event of major emergency. On August 25, 5 days after learning that the case had been remanded to the Regional Office on the question of mandatory of voluntary overtime, the Company declared an end to the lockout.

The inference is warranted, and I so find, that in proceeding with a lockout, the Company relied upon what it regarded as the authority of *Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In the case, the Court stated in pertinent part, id. at. 152-153; "Moreover, even were the activity presented in the instant case "protected" activity within the meaning of Section 7, economic weapons were available to counter the Union's refusal to work overtime, e.g., a lockout." It is evident that in the present case, the Company proceeded with the lockout, believing that it was free to do so without regard

to whether the Unions' inside game activities were protected under the Act.

However, when the case was submitted for advice, the Company realized that the Regional Office did not share the Company's interpretation of applicable law. Therefore, the Company changed its explanation, in order to place the lockout in a more acceptable category, i.e., that the Company locked out its employees in order to deprive the Unions of the power "exclusively to determine the timing and duration of a strike," or to bring economic pressure to bear on the Unions in support of the Company's bargaining position. See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 310-318 (1965).

When the Division of Advice remanded the case to the Regional Office, the Company realized that the serious and substantial question of whether and to what extent overtime was mandatory or voluntary, could be critical to the outcome of the case. Therefore, the Company decided to end the boycott, and thereafter, if deemed necessary, to discipline employees for overtime refusals. I find that the Company did so in order to curb its potential liability in the event of an adverse final decision, and not for the reasons advanced by the Company. If the Company was genuinely concerned about the economic impact on its employees, then it would not have locked out the employees in the Local 702 units for over 3 months. Moreover, the same consideration which ostensibly led the Company to refrain from disciplining employees for overtime refusals prior to and as an alternative to a lockout, was still present. That is, that discipline could result in the loss of good employees, not withstanding that the Union were responsible for the inside game activities.

Before proceeding to the next major factual question, I shall at this point refer to certain matters which I have either not taken into consideration in determining the Company's

motivation for the lockout, or which I find either not probative or immaterial to that question.

After the lockout ended, Local 702 refused to end overtime boycott and work-to-rule practices until agreement was reached on a contract. Local 702 filed unfair labor practice charges, alleging that the Company violated Section 8(a)(1), (3), and (5) of the Act by unilaterally changing working conditions and disciplining employees for engaging in protected concerted activities. The charges concerned discipline or alleged discipline for refusing overtime work. In May 1994, the parties, with the approval of the Regional Director, agreed to defer the charges to their contractual grievance and arbitration procedure, in a manner consistent with Board policy regarding such deferral, following final disposition of the present case. At the hearing, I ruled in sum, that it would be inconsistent with the stipulation for me to hear and consider evidence concerning the Company's postlockout statements and actions with regard to actual alleged overtime refusals. If such evidence were received, the present case would inevitably become enmeshed with the same litigation which the parties had agreed to defer to grievance arbitration. This would be contrary to the intent of the stipulation. Therefore, I have not taken the Company's postlockout course of action in determining the motivation for the lockout, beyond its stewards concerning the end of the lockout.

I also rejected the General Counsel's proffer of evidence to demonstrate that the lockout had a "chilling effect" on employee concerted and union activities. Specifically, the General Counsel sought to show that after the lockout, employees were afraid to refuse overtime or work-to-rule, and participation in such activity declined substantially. As indicated Vice President Dodd testified that after the lockout, fewer employees refused overtime or engaged in work-to-rule practices.

I rejected General Counsel's proffer of proof for two reasons. The first was for the same reason that I declined to hear evidence concerning the Company's postlockout course of conduct, namely,that receipt of such evidence would inevitably entail litigation of matters which the parties agreed to defer to grievance arbitration. Second, assuming "chilling effect" to be an issue in this case, the question would not be whether the lockout actuality had such an effect, but whether the lockout predictably would likely have such effect. That determination would be made on the basis of the Company's motivation and the objection facts, and not on the employees' subjective reactions to the Company's conduct. The question of whether the Company's conduct was unlawful does not turn on whether the employees were strongwilled or intimidated. The Board, with Supreme Court approval, had repeatedly held that it will not determine the merits of unfair labor practices allegations on the basis, of employees' reactions to the employee's conduct. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969); and the Board's discussion of "chilling effect" in *Darlington Mfg. Co.*, 165 NLRB 1074 (1967), enfd. 397 F.2d 760 (4th Cir.1968), cert. denied 393 U.S. 1023 (in particular, the Board's decision, supra at 1086, and the court of appeal's decision, supra at 772-773).

I have also not attached significance to evidence of cooperation and consultation between Local 702 and Local 148, beyond that discussed previously in this decision. The Company has good reason to believe, and correctly so, that if Local 702 alone was locked out, that Union would set up picket lines at the power plants, which the Local 148 employees would honor; and therefore, no purpose would be served by locking out only Local 702. The Company's object in locking out both Unions was the same; namely, to stop the inside game activities.

I also attach no probative value to opinions expressed by union representatives on May 20, concerning the Company's speculating. Only the Company knew the reasons for the lockout.

Newton electrician John Koekhler testified that at 4:20 a.m., on May 20, when he was working on the third shift, Supervisor Lance Stanley escorted him to the gate, saying, "[Y]ou no longer have jobs here." Stanley, in his testimony, denied making the remark. Stanley testified that he was instructed to tell the employees that this was a lockout, that he so informed Koehler, and that Koehler responded "cool," indicating that he was happy to get off work.

I am not persuaded that either version of the conversation is more credible than the other. The Company, in its statements to the Unions, the employees, and the public made clear that it was locking out the employees, and not discharging them. The remark attributed to Stanley by Koehler is not alleged on an independent unfair labor practices labor practice. Assuming that Stanley made such a remark, I would not attach significance to this isolated remark by a first-line supervisor (who was told of the lockout only 30 minutes earlier), in assessing the Company's motivation.

I have also not attached significance to an incident at Matoon (eastern division) on May 19, which will be dismissed in connection with the employees' activities during the period from April 24 to May 20. By this time, President Greenwalt had decided to implement the lockout, and the incident did not effect his decision. I have also not attached weight to the Company's action in terminating health insurance coverage for employees in the full week ending May 22, in determining the Company's motivation for the lockout. The matter will be discussed in connection with the complaint allegation of an independent unfair labor practice.

At this point I shall proceed to the next major factual questions, which focus toward the ultimate issue of whether the employees' activities were statutorily protected.

D. Did Local 702 Engage in Concerted and Union Activities During the Period from April 24 to May 20, for an Object of Forcing or Requiring the Company to Enter into a "hot cargo" Agreement Prohibited by Section 8(e) of the Act

The 1989-1992 Division contracts between Local 702 and the Company provided that:

> SEC. 1.03. In the even the Company may find it necessary to contract work covered under this Agreement, it is mutually agreed between the parties hereto that no such work shall be contracted, except projects customarily contracted for, which would result in laying off regular employees of the Company who have established seniority under this Agreement.

The 1989-1992 Newton contract provided in Section 1.07, with respect to contract work:

> The Company agrees that the maintenance and repair work now performed by employees represented by the Union will continue to be available to them, unless this work is reduced or eliminated such as by changes in operating methods or procedures. The Company will contract out such work only to the extent that it cannot be performed by existing Company forces working on existing jobs within the scope of his Agreement without prolonged overtime and within the time required by the Company for the completion of the work involved. This section shall not restrict the contracting out of major construction projects or work beyond the skills of employees or work which should be handled by outside specialists in their respective fields or work caused by peak periods or emergency conditions. Whenever possible, i.e. planned outages or major projects, etc., the

> Company will discuss such contracting work with the Union.

However, with respect to the Divisions, Section 1.03 reflected only in part pre-July 1992 agreements and understandings between Local 702 and the Company regarding contracting of work. In considering the history of this matter, it is appropriate at this point to introduce another major General Counsel witness.

Herbert Miller (no relations to Daniel Miller) worked for the Company from May 1955 to December 1993. Thereafter, until February 8, 1991, he served with Local 702 in various capacities, including business representative and assistant business manager. Throughout most of his tenure with Local 702, Herb Miller was that Union's principal spokesman in dealing with the Company, including grievance processing and contract, negotiations. (Hereafter, unless otherwise indicated, "Miller," refers to Herb Miller concerning matters prior to January 1, 1992, and to Dan Miller concerning matters subsequent to that date).

Until 1982, the Company and Local 702 had an understanding that the Company would contract work only to unionized firms, and that prospective contractors would have to "get right" with Local 702. That year the Company informed Local 702 that it would no longer honor the agreement.

Thereafter, contracting was a sore point with Local 702. The Union, in disagreement with the Company, interpreted the contractual term "laying off," as encompassing any situation in which a unit employee was displaced from a particular job. Over the next few years, Local 702 processed to arbitration, and lost, seven grievances pertaining to contracting.

In 1990, the Company sought to persuade a reluctant Local 702 to agree to a training program for lineman. Herb Miller

told Company Vice President Dodd that Local 702 would like to revive the pre-1982 understanding on contracting. He proposed that in exchange for the training program, the Company would agree that work normally performed by division employees could be contracted only to unionized firms. Dodd agreed, with certain limited exceptions. The training program was embodied in a written agreement. The agreement on contracting was verbal, thereafter becoming known as the "gentlemen's" or "Miller-Dodd" agreement.

In the spring of 1991, Dan Miller complained to Baughman that certain unit work was contracted to a nonunion firm. Baughman responded that the work, which involved use of a helicopter, was not unit work. Herb Miller advised Dan Miller should deal with the matter as a violation of safety rules. Dan Miller subsequently understood that the contractor reached an agreement with IBEW, and the contractor finished the job.

During the 1992 contract negotiations, in early May, Baughman told Local 702 that effective as of the end of contract term (June 30, 1992). The Company would no longer honor the gentlemens agreement, because it was illegal. Eastern Division Manager Patterson told Dan Miller that the Company had reason to believe that the big union contractors were rigging bids, and the Company needed to make the process more competitive.

Earlier, on April 9, 1992, Local 702 proposed the following clause for inclusion in the 1997-1995 division contracts:

> Subcontracting . . . The Utility agrees that it will not enter into or continue the subcontracting of any work which is ordinarily and customarily done by its regular employees if there are any employees on layoff; or if as a result thereof, employees will be laid off, required to move to other reporting centers, or to accept a lesser rate of pay, or cause to work more than 20 miles from their reporting center. The Utility further agrees that it will not

> subcontract any work unless the employees performing such work receive at least the same wages, benefits, and working conditions as the employees covered by this Agreement.

Local 702 had unsuccessfully presented the same proposal in prior negotiations. Dan Miller testified that the last sentence was intended to preserve unit work. Union construction wages were higher than company wages. Therefore, the clause would remove any economic continue to contract out unit work.

At their negotiating session on June 30, 1992, the parties discussed the last sentence of Local 702's proposal. Baughman asked Dan Miller why Local 702 wanted this proposal. Miller, referring to rumors that the Company was bringing in line crews from Texas, declared that Local 702 did not want a bunch of $5 per hour Mexicans doing their work. Baughman asked Miller in rapid succession, whether the Company had done this before, whether they said they were going to do it, and whether they said they were going to change their practice. Miller answered "no" to each question.

Miller testified that by reason of their exchange, he withdrew the last sentence of Local 702's proposal. Miller testified that the understood Baughman to mean that the Company would not change its current contracting practices, and specifically, that it would continue to use only union contractors in the same manner as prefaced in the gentlemen's agreement. As will be discussed, this was not the only occasion in which the parties, through a cryptic exchange, misunderstood each others' positions.

As part of their tentative 1992-1995 contracts, Local 702 and the Company agreed to amend section 1.03 of the Division contracts to add two additional restriction on contracting. The amended section 1.03 read as follows:

> In the event the Company may find it necessary to contract work covered under this Agreement, it is mutually agreed between the parties hereto that no such work shall be contracted, except major projects customarily contracted for, if such contracting would (1) result in laying off regular employees; (2) require an employee to permanently move to another reporting headquarters; or (3) result in an employee being forced to accept a lower rate of pay.

Local 702 presented in evidence, through Dan Millers' testimony, a document purporting to be Local 702 contract proposals. (C.P. Exh. 9). The proposals included an amended section 1.03, which in part was similar to the language tentatively agreed upon by the parties. However, the proposal added an additional sentence stating: "Nothing in this clause shall allow the Company to subcontract work for the sole purpose of excluding a reasonable amount to overtime which could be completed by their regular employees."

Local 702 sought to prove that it presented the proposals during the reopened 1993 negotiations. For the reasons now discussed, I find that Local 702 presented the proposals in 1992, during the negotiations which led to the tentative agreement of July 1992.

The cover page of the document is missing. Miller testified that he could not locate that page. Therefore, as introduced in evidence, the document is incomplete and undated. That fact alone warrants suspicion and close scrutiny.

Miller's testimony concerning the date and circumstances of his submission of the proposal was hopelessly confused and contradictory. Miller testified at one point that he submitted the proposals after the March 19 negotiating session, and at another point, that he did not know when he submitted the proposals. However, there were no negotiating sessions between March 19 and May 7, and it is undisputed

that Charging Party's Exhibit 9 was neither presented nor discussed at the May 7 session.

On March 18, the Company presented its "final" contract proposal for the divisions (C.P. Exh. 1). The proposals included, as item 4, the same language on contracting (amended section 1.03 as tentatively agreed in July 1992). On March 19, Local 702 presented a counterproposal to Charging Party's Exhibit 1, (C.P. Exh. 3) indicating that Local 702 agreed to item 4. Therefore, if Charging Party's Exhibit 9 was submitted after March 19, it would have been inconsistent with Charging Party's Exhibit 3. Plainly, this would have warranted some discussion, at the next session. However, as indicated, Charging Party's Exhibit 9 was not discussed at the May 7 session. It is also undisputed that contracting was not discussed at either the March 18 or 19 sessions. Indeed, Miller testified that he could not recall any specific discussion of Charging Party's Exhibit 9.

Charging Party's Exhibit 9, as introduced in evidence, began by stating that "In addition to the typewriter proposal concerning fringe benefits and medical insurance, the Union make [sic] the following proposals: ..." Local 702's March 19 counter-proposal was handwritten. Therefore, it is evident that Charging Party's Exhibit 9 was not intended to supplement Charging Party's Exhibit 3. Miller testified that the missing cover page of the Charging Party's Exhibit 9 referred to the Company's typed proposal on medical insurance included in Charging Party's Exhibit 1. His assertion makes no sense. First, it is highly improbable that Local 702 would characterize company proposals as its own proposals. Second, the Company's proposals on medial insurance encompassed major issues which remained in dispute, including premium costs, and the Company's proposals for Medicare carve out and mirror image.

Moreover, Charging Party's Exhibit 9 consisted substantially of matters which were resolved in the 1992

negotiations. It is unlikely that at this stage in the negotiations, Local 702 would present a proposal which dealt substantially with resolved and relatively minor matters, but was silent on major issues in dispute.

As an adverse witness for the General Counsel, Baughman testified that he did not know when Local 702 proposed Charging Party Exhibit 9, but that it was prior to April 1993. Later, as a company witness, Baughman testified that having examined the items in Charging Party Exhibit 9, he recalled that he saw Charging Party Exhibit 9 during the 1992 negotiations, prior to July 10, 1992. I credit Baughman. I find that Local 702 submitted Charging Party Exhibit 9 during the 1992 negotiations, and that the proposal therein on subcontracting was not resubmitted or discussed after July 1992.

In the fall of 1992, Dan Miller asked Baughman whether the Company believed it could contract to nonunion firms. Baughman answered that it could if such contracting did not violate any of the three conditions set forth in the July 1992 agreement on section 1.03. Miller replied that this was to their agreement. They remained in disagreement on the matter. Also, in the fall of 1992, two grievances in the eastern division added a new dimension to the contracting dispute.

At Matoon, a unit employee working as a janitor had retired. Thereafter for about 3 years unit employees performed the janitorial work on a rotating basis. Manager Herren decided that the work was not being performed satisfactorily, and contracted the janitorial work to D & D Cleaning Service. Local 702 Business Representative Phillips asked if the contractor was union. Herren answered that it probably was not. Phillips replied that the Company could either hire an additional janitor, or assign other janitors to work overtime. Herren disagreed.

On September 30, 1992, Phillips filed a grievance, asserting that the Company violated the contract by contracting "unit work normally performed by Local 702 members." The Company denied the grievance, stating that the work was not regularly performed by Matoon janitors, and the contracting did not result in any of the three conditions set forth in section 1.03.

Miller and Baughman discussed the grievance. They disagreed as to whether the grievance involved unit work, and again, as to their general agreement. Miller asserted that the Company promised not to change its contracting practices, and that he understood the Company would not use contractors who paid substandard wages. Miller pointed out that Local 702 had agreed to an 80-percent entry level wage for janitors. He argued that it made no sense for Local 702 to make such concessions if the Company was going to contract the work. Miller knew that D & D Cleaning Services was nonunion, but he did not know their wage scale. Baughman asserted the Company's right to contract work, subject only to the conditions of section 1.03.

In October, 1992, at Charleston, the Company was using a contractor to pour concrete. The contractor agreed to pour concrete for a transformer pad without extra charge. A company foreman (unit employee) protested that the Company took away unit work. On November 19, 1992, Business Representative Phillips filed a grievance, alleging that the Company violated section 1.02 of the division contract (limiting the contract to work performed on company property), by contracting the work on the transformer pad.

Miller again involved his alleged understanding with Baughman, although he did not know whether or not the contractor was nonunion. On February 24, 1993, the Company denied the grievance. The Company asserted that section 1.02 was irrelevant, and that none of the conditions set forth in section 1.03 were present. Both Mattoon janitor

and the transformer pad grievances were pending and unresolved at the time of the lockout (and were still pending at the time of the present hearing).

On January 26, 1993, when Local 702 and the Company resumed their contract negotiations. Local 702 proposed that they settle on the basis of the tentative 1992 agreement, with employee monthly contribution for family medical plan coverage at $75 per month, i.e., as initially understood by Local 702. The following day, Local 702 proposed to arbitrate the matter of premiums. The Company rejected all three proposals. None of the proposals, if accepted, would have called for any change in the contract or new agreement regarding contracting of work.

On February 16 or 17, when the parties again met in negotiations, Miller asked Baughman whether the Company still took the position that it could subcontract nonunion. Baughman answered, "yes." Miller replied that if the Company insisted on abiding by the law, Local 702 would insist that the Company abide by the law on everything. Miller did not expressly elaborate on his remark. However, Local 702 was then maintaining that the Company lied and cheated with respect to the matter of medical insurance premiums, and through contracting was depriving its employees of work. At the time, the appeals on the unfair labor practices labor practice charges relating to the aborted 1992 contract were still pending in the office of the General Counsel. The inference is warranted that Miller had either or both of these matters in mind when he made his remark.

About March 1, Miller had a conversation with Western Division Manager Patterson, in which they discussed the contracting issue. Miller testified in sum as follows: He expressed concern that the Company's attitude was that it could contract any work to anyone it wanted. Patterson answered that he did not think this was the Company's position. Miller said that he wanted an agreement that the

Company would contract work only as it did in the past, and that he thought the Newton contract language was the way the Company had operated. Patterson asked to see the language. Miller cautioned that the language would have to be revised for the divisions.

Patterson's version of the conversation did not differ materially from that of Miller. Patterson testified in sum as follows: Miller asked what was the Company's hangup on the gentlemen's agreement. Patterson answered that the Company considered he agreement to be illegal, and was concerned about noncompetitive bidding by contractors. Patterson was concerned about the issue. Miller said that he had some substitute language which he would send to Patterson for submission to Baughman.

It is undisputed that Miller promptly sent Patterson a copy of the Newton contract language on contracting out work, and that Patterson faxed the copy to Baughman. Miller testified that he may have asked Baughman whether he got the document, but there was no subsequent discussion of the Newton language in the negotiations over contracts. Miller further testified that he never withdrew the "proposal."

Baughman testified that he did not know why Miller sent him the Newton Language, and he did not ask either Miller or Patterson. However, in a position letter to the Board's Regional Office dated June 10, Company counsel Cohen stated that in 1993, Local 702 proposed some form of Newton subcontracting language.

I find that the testimony of Miller and Patterson together reflects the substance of their conversation. It is evident that both men understood that Miller was proposing the Newton contract language as a basis for division contract language, instead of the former gentlemen's agreement. In light of Patterson's testimony, and company counsel's position statement, I do not credit Baughman's testimony that he did

not know why Miller sent him the Newton language. Baughman understood that Miller was proposing that the Newton language could be used as the basis for resolving the issue of contracting. However, Baughman chose to ignore the proposal. Moreover, it is significant that the Newton language is addressed to unit work preservation, and makes no distinction with regard to the union status of prospective contractors. The proposal evidences that Local 702 was primarily concerned with unit work preservation, rather than union vs. nonunion contracting.

Business Representatives Roan and Dan Miller, and several other witnesses, testified in sum as follows concerning the union ratification vote meetings during the week of April 19: Miller identified the principal issues, on which he expressed dissatisfaction with the Company's proposal. They were the matter of medical insurance premiums, the Company's proposals for Medicare carve out and mirror image, and second and third year wage increases. Three of these four issues related to health care coverage. Medicare carve out and mirror image concerned coverage for retired employees. The Company presented these proposals after the aborted July 1992 tentative contract, and Local 702 regarded them as regressive. Most discussion involved the health care coverage issues. Jim Wesslund, an eastern division employee who was promoted to supervisor in May, and was the only company witness concerning contract issues discussed at the meetings, testified that he could not recall discussion of any issue other than health care coverage, as reasons for rejecting the Company's proposal.

The General Counsel witnesses further testified in sum as follows: At the division meetings, Miller also discussed the matter of contracting. He said that Local 702 wanted additional protection, and referred to the Matoon janitor and transformer pad grievances. Miller said that the Company promised that it would not change its contracting practices,

and would not contract work to Mexican nationals at $4 or $5 per hour. Some employees asked about the gentlemen's agreement. Roan answered that the agreement was illegal and unenforceable. However, with reference to the grievances, he asserted that the Company violated the recognition clause of its contracts.

In light of the witnesses' testimony, it is evident that both Local 702's leaders and membership regarded the health care coverage issues as paramount. They regarded the matter of contracting as a secondary issue, and possibly one which could be resolved through the contractual grievance arbitration procedure. As discussed, even while the two contracting grievances were pending, Local 702 indicated a willingness to accept the tentative July 1992 agreement, if the matter of medical care premiums was resolved in a satisfactory manner. Therefore, it is probable that if their health care coverage issues had been resolved, Local 702 probably would have recommended, and the membership voted, to accept the Company's proposal, notwithstanding dissatisfaction with other aspects of the Company's proposal, including contracting.

Local 702 and the Company did not discuss contracting in formal negotiation between February 17 and May 7, although they met in sessions on March 5, 18, and 19. As indicated, Miller informally discussed contracting with Manager Patterson about March 1, and thereafter forwarded a copy of the Newton contracting language. There was no further con-tract between the parties on the issue until April 27, when Miller sent a letter to Baughman. Miller stated in sum that (1) Baughman recently said that the Company may change its practices regarding subcontracting, (2) Local 702's position was that there was no unlawful agreement between them regarding subcontracting, (3) there was no current contract in effect between the parties, and (4) Local 702 requested notice

and bargaining before the Company engaged in any subcontracting.

When Local 702 and the Company met in negotiations on May 7, the inside game activities had been underway for nearly 2 weeks. Business Representative Roan entered the negotiations. At the May 7 session, the parties engaged in an extensive, confrontational, and fruitless discussion of contracting.

It is evident that in the present case, the parties regard the substance of this session as significant and possibly critical on the issue at hand. Although much of what transpired at the session is not disputed, certain statements or alleged statements were vigorously contested at the hearing. Nine members of the company negotiating team and 17 members of the union team were present at the session. Among these, eight were called to testify concerning the meeting. (Four Local 702 representatives and four company representatives.) In addition, I received in evidence, minutes taken by three company and seven Local 702 persons present, plus a company composite of two of the minutes.

A determination of the ultimate factual question at hand must take into consideration the overall course of dealings between Local 702 and the Company with respect to the contracting issue. However, at this point my analysis of the May 7 meeting shall begin with a comparison of the versions of Miller and Baughman, the two principal negotiators.

Business Representative Miller testified in sum as follows: At the outset, the mediator asked the parties to identify the issues. Miller did so, and they discussed the issues. Miller listed the issues, in sum, as medical insurance premiums, Medicare carve out, mirror image, Newton overtime practices, subcontracting grievances in the eastern division, subcontracting in general, accumulated and unresolved grievances (including grievances concerning contracting at

Newton), and the Newton sick leave reporting procedure. Miller did not say why the Local 702 membership rejected the Company's "final" offer.

Miller further testified in sum as follows: Baughman asked in what regard Local 702 had a problem about subcontracting. Miller answered, "Who and when?" He reminded Baughman of their previous discussion and repeated his remark about Mexican nationals. Baughman said that that Local 702 wanted their daytime work to be their work at night. He asserted that the Company violated their understanding by contracting out unit work involved in the eastern division grievances. Baughman responded: "What you really want is to use union only subcontractors." Miller replied: "That will work." Miller gave this answer because he believed that such policy would solve the problem, by removing any company incentive to contract out unit work. However, he did not actually propose a union-only subcontracting agreement. Shortly thereafter, the parties caucused.

Miller went on to testify in sum as follows: Prior to the caucus, Roan had asked whether the gentlemen's agreement had permitted only contracting to union firms. Baughman answered that the agreement applied only to unit work. At the Local 702 caucus, Roan reminded Miller that a union-only agreement was illegal, and advised Miller to straighten it out when they got back to the meeting. Miller asked Roan to do the talking.

Miller further testified in sum as follows: When they returned to the meeting, Local 702 Business Manager James Moore and Eastern Division Manager Herren engaged in a heated exchange about subcontracting. Moore said that the contracting clause was designed to take care of "peaks" of work, when the Company did not have enough employees. Herren said that he didn't care whether or not a contractor was union. Moore retorted that this was "bull shit." Moore went on to explain that when the Company went outside

IBEW to use crafts, i.e., employed by contractors, to do the work, the Company would be risking jurisdictional disputes between trades unions. He said that therefore, the Company would have big problems. Herren laughed at Moore. Moore said that he would like to go back to the way things were, but he knew that things had changed.

Miller further testified in sum as follows: Baughman said that a union- only clause was illegal. Roan responded: "Chuck, we know it's illegal. That's not what we're asking for." Roan proposed that the Company require contractors to pay at least the same wages that unit employees received for doing the same type of work. Roan argued that it did not make sense for Local 702 to negotiate wages, and then see the Company get the work done at a different rate. No other proposals on contracting were made at the session. In his testimony, Miller did not indicate what if any response the Company made to Roan's proposal.

Miller additionally testified in sum as follows: The Company proposed to withdraw mirror image, if the employees resumed working as before April 24, and Local 702 recommended acceptance of the company offer. Local 702 rejected the proposed. After a second caucus, the Company proposed to withdraw Medicare carve out, with retirement at age 60 instead of 55, and the same previously proposed commitments by the Union. Local 702 also rejected this proposal. Baughman also proposed to settle the Newton contracting grievances after the parties reached agreement on a contract. After the session, Miller, Roan, and Baughman had a conversation, but they did not talk about contracting.

Baughman testified in sum as follows: When the session began, Miller gave reasons why the membership rejected the Company's offer, and listed them as issues in the negotiations. They included medical insurance premiums, Medicare carve out, mirror image, Newton issues (including sick leave reporting), unresolved grievances, an issue

concerning the 401K plan, and subcontracting. The parties presented their positions on contracting. Miller expressed concern about who would do the work, and when. He said that contracting should be used to cover "peaks," and not to take away overtime opportunities for unit employees. Miller again said that he did not want $5 per hour Mexicans on company property. The Local 702 representatives expressed concern about the Company's contracting practices, and referred to the Matoon janitor and transformer pad disputed work. They asserted that unit employees could have done the work. The representatives also argued that the Company could have problems with jurisdictional disputes by contracting out work, whether to union or nonunion firms. Baughman countered that the Company was not required to offer overtime work to the unit employees, and could contract out work in the divisions if such contracting did not violate any of the three conditions in section 1.03.

Baughman further testified in sum as follows: He told Miller: "What you want us to agree to is we will contract only to union contractors." Miller answered, "yes." Baughman replied that the Company would not agree to that. Roan expressed concern because Local 702 represented employees of numerous contractors in southern Illinois, and this "could have an effect on whether or not they were working on a particular job." Roan said that a union-only subcontracting clause was illegal, but they could have a verbal agreement to continue the former agreement. Baughman responded that this was illegal and he would not agree to it. Roan said that if the Company said they no longer had an understanding on nonunion contracts, then "we got a big problem."

Baughman additionally testified in sum as follows: The Company offered to withdraw Medicare carve out and mirror image. Baughman asked Local 702 to get things back to normal, including an end to the overtime boycott, and to agree to contract extension, but that his proposal on the health care

issues was not conditioned on Local 702 agreement to his request. However, an internal company memo prepared by Baughman' secretary, and distributed within the Company, stated that at the May 7 session, the Company offered to withdraw Medicare carve out and mirror image (with change in retirement age from 55 to 60 to qualify for coverage), and changes in the 401-K plan, in return for a committee recommendation, extension for a contract vote, and that Local 702 begin taking overtime; and that Local 702 refused to recommend the proposal. Business Representative Roan, in his testimony, substantially corroborated Miller's testimony in this regard, indicating, as did the company memo, that the Company's proposals included a 401-K adjustment. In light of the company memo which obviously originated from Baughman, I credit Roan's testimony in this regard. In sum, the Company's proposal was contingent on Local 702 taking the requested action.

In his affidavit to the Board's Regional Office dated June 2, Baughman stated in sum as follows: Following the May 7 formal session, he had a conversation with Roan and Miller. Roan said that Local 702 had a real problem with the Company's position on subcontracting. He did not explain. Baughman said that the Company was not changing its position. Miller reminded Baughman of one of their earlier conversations about contracting. At the present hearing, Baughman testified that he did not recall the conversation. Roan testified in sum as follows: Following the formal session, he and Miller talked with Baughman. In addition to talking about prospect of a strike, they briefly discussed some issues in dispute. Roan suggested that Baughman try to resolve the outstanding grievances and Newton overtime issue, and promise not to change company practices. Baughman replied that he would work out the grievances with Miller and Phillips after the parties reached a contract. This was the extent of their conversation with reference to

contracting. Roan did not say that union-only contracting was a key to reaching agreement on a contract. I credit Roan concerning the conversation.

Roan testified before Miller in this proceeding, and testified in greater detail than Miller concerning the May 7 negotiations. Roan substantially corroborated, and in some respects supplemented Miller's version of the meeting, with one significant exception.

Roan testified that when Baughman said that Miller wanted the Company to agree to use only union contractors, Miller answered: "Yeah, that will do." Roan further testified that Business Representative Phillips said that he would like to have an agreement like "Joe and Herb," i.e., the Miller-Dodd agreement. However, in his investigatory affidavit, Roan stated that Miller answered "yes" to Baughman's remark (which Roan attributed to Manager Herren). Roan's minutes of the meeting also indicate that Miller responded "yes" to Baughman's statement. Therefore, I credit Baughman's testimony concerning their exchange.

Roan further testified in sum as follows: After the first caucus, he told Baughman that he knew a union-only contracting agreement was illegal and unenforceable. He asked that the Company not change its subcontracting practices, and abide by its agreement that it would not contract out work at $4 or $5 per hour. He proposed that the Company agree not to subcontract work at less than the wages and benefits they were then negotiating. As indicated, Miller testified that Roan simply referred to wages. Martin Lee, a member of Local 702's negotiating committee, testified that Roan referred to wages and benefits.

Roan further testified in sum as follows: Herren said that the Company did not intend to subcontract work at $4 or $5 per hour, but would contract work if it could do so cheaper and more economically (then using unit employees) without

violating the conditions of section 1.03. Herren asserted that under the contract, the unit employees had more protection than before July 1992. Roan disagreed. He said that more nonunion or nonunit employees were doing tree trimming work in the southern division. Roan referred to West Frankfort (southern division) where the operating engineers and laborers unions picketed work performed by an IBEW subcontractor. He stated that the unit employees crossed the picket line because it was their work, but that there was a big problem for all sides when other crafts were involved. Roan, in his testimony, was equivocal about whether Business Manager Moore said that the Company would have big problems if it contracted out work to nonunion people.

The Company's composite minutes, assertedly based on notes taken by Jerry Simpson and Tim Dunham, indicate that Roan said that the Company would have big problems if it used nonunion contractors. However, Simpson's notes attribute the remark to Moore, and Dunham's notes do not refer to the remark. None of the other notes taken at the session make reference to such remarks. Among the company witnesses, Simpson testified that Moore said that in the past, contractors would make their peace with the Union, and that if the Company used nonunion contractors, there would be problems and "we would picket." Simpson did not attribute any such remark to Roan. Manager Herren testified that both Roan and Moore said there would be big problems if the Company brought in nonunion contractors. He testified that Moore said there would be trouble with the Union and the trades, and that Moore wanted it the old way, when contractors had to get right with the Union. Manager Fritz testified that Moore said he wanted things the way they were. He did not, in his testimony refer to statements by Moore or Roan about problems if the Company used nonunion contractors. Among the General Counsel witnesses, Moore, in response to a leading question from counsel for the General

Counsel, testified that he said that if the Company contracted out work to non-IBEW contractors, there would be jurisdictional dispute problems with other trades unions. Employee Martin Lee testified that Moore said that if the Company was planning to use nonunion contractors, it would have big problems, because of jurisdictional dispute problems, involving building trades unions.

I find that Moore, and not Roan, remarked that the Company would have big problems if it contracted out work to nonunion firms. As discussed, Simpson's minutes attributed the remark to Moore, and there was no evident basis for attributing such remark to Roan in the Company's composite minutes. Simpson, in his testimony, did not attribute such remark to Roan. None of the union witnesses testified that Roan made such remark.

I further find that Moore referred to nonunion contractors, and not, as testified by Miller, simply to non-IBEW contractors. As discussed, union committee member Lee testified that Moore referred to nonunion contractors, and Roan was equivocal in this regard. I am not inclined to attach much weight to the manner in which Moore testified concerning his remarks.

However, I find that Roan picked up on Moore's remark by explaining that such problems involved jurisdictional disputes among trade unions. I credit Roan's testimony in this regard. None of the company witnesses, in their testimony, denied that the Local 702 representatives talked about jurisdictional disputes. Roan had extensive experience in representing employees of IBEW contractors, and was particularly knowledgeable concerning jurisdictional disputes. In light of the testimony of Roan and Miller, I find that Roan asserted in sum, that the Company could safely contract work to IBEW firms, and Local 702 would not object such contracting; but that the Company could become enmeshed in jurisdictional

disputes, and thereby make problems for itself, by contracting work to non-IBEW firms, whether union or nonunion.

Returning to the outset of the meeting, I find that Miller did not proffer any explanation as to why Local 702's membership voted to reject the Company's "final" offer. None of the minutes of the May 7 meeting indicate that Miller gave such explanation. Moreover, Baughman, in his testimony, equated the alleged explanation with Miller's enumeration of issues in dispute between the parties. I find it unlikely that Miller would have given all of these issues as reasons for membership rejection of the Company's offer. Some involved relatively minor matters. Local 702 repeatedly indicated that the parties could reach agreement on contracts if the major issues, i.e., those involving health care coverage, were resolved. In sum, at the May 7 session, Miller initially listed issues in dispute, without defining their relative importance.

This leaves two significant credibility questions in dispute concerning the May 7 session; namely, what Roan said about the legality of a union-only contracting agreement, and what if any proposal he made regarding contracting. In resolving these questions, it is necessary to take into consideration, pertinent developments following the May 7 session.

The parties did not discuss contracting at the following session on May 26. The next session was on June 16. On June 2, the Company filed unfair labor practices charges, alleging in sum, that Local 702 violated Section 8(b)(4)(A) and (3) of the Act, by proposing a contract violative of Section 8(e), and since about April 27, inducing and engaging in work stoppages to obtain such a contract.

By letter dated June 3 to Baughman, under Miller's signature, Local 702 asserted in sum as follows: if any Local 702 proposal could be interpreted as violating Section 8(e), such proposal is withdrawn. The Company previously had a

voluntary practice of contracting work only to union firms. When the Company indicated an intention to change this practice, Local 702, on April 9, 1992, proposed a lawful "prevailing wage" contracting clause. Local 702 withdrew the proposal when the Company indicated that it intended to continue its practice of contracting to union firms. In 1993, Local 702 proposed some form of Newton subcontracting language for the divisions. Also, an issue was raised concerning contracting of overtime work. Local 702 does not believe that the parties had an illegal "hot cargo" agreement. The Company can lawfully chose to contract only to union firms. Because the Company has decided otherwise, Local 702 now resubmits its proposal of April 9, 1992.

Dan Miller testified that Local 702 Attorney James Singer prepared the June 3 letter, and that he did not read the letter before signing it. Miller testified concerning inaccuracies or alleged inaccuracies in the letter. However, he did not dispute that the letter reflected Local 702's position as of June 2.

By letter dated June 4, Baughman responded to Miller, Baughman disagreed with Local 702's assertion that they never had a union-only contracting agreement. Baughman asserted that at the May 7 session, Miller and Roan said that maintenance of a union-only contracting understanding, was a key to reaching agreement. Baughman further asserted that the resubmitted "prevailing wage" proposal was also unlawful, and that in any event, the Company did not wish to so limit its contracting opportunities.

By letter dated June 5, Miller responded to Baughman, Miller stated tht in view of the Company's assertion of illegality, Local 702 was amending its "prevailing wage" proposal so as to refer only to "wages and fringe benefits," rather than "wages, benefits and working conditions." Miller denied that Local 702 said that maintenance of a union-only understanding was a key to reaching agreement.

By letter dated June 3, Baughman informed Local 702 that he was confirming, in writing the Company's May 7 proposal to withdraw Medicare carve out and mirror image, with the change in retirement age to quality for coverage. As found, the Company's May 7 proposal was coupled with certain conditions. Therefore, Baughman's letter constituted a revised proposal, i.e., without the indicated conditions. Baughman's letter did not address the critical matter of Medical insurance premiums.

On June 4, Local 702 submitted a position statement to the Board's Regional Office concerning the Company's unfair labor practices charges. Local 702 Attorney Teitelbaum stated that Local 702's letter of June 3 summarized its position concerning negotiations on subcontracting. Teitelbaum further asserted that Local 702 submitted two proposals on subcontracting during the negotiations: the April 9, 1992 proposal and the March 1993 proposal for Newton contracting language. Neither the position statement, nor Local 702's letter of June 3, made any reference either to the proposal contained in Charging Party's Exhibit 9, or any proposal allegedly submitted at the May 7 session.

On July 12, the Company requested to withdraw its unfair labor practices charges. The following day the Regional Director approved the request. Baughman testified that the Company requested to withdraw its charges because Local 702 (as of June 5) was proposing a lawful contracting clause.

In January 1994, the parties reached agreement on contractual language regarding contracting, for the Division contracts. They agreed to retain the language of section 1.03, as tentatively agreed in July 1992. By a memorandum of understanding, they further agreed, in sum, that the Company did not intend to significantly change its subcontracting practices with respect to work to be subcontracted; but that if the Company found it necessary to make such changes, it would discuss the proposed changes with Local 702.

For the following reasons, I find that at the May 7 session, Roan did not present any contract proposal on contracting out of work, and specifically, that he did not make an equivalent wage proposal. I further find that Roan said that a union-only subcontracting clause was illegal, but the Company and Local 702 could have a verbal agreement to continue the former gentlemens' agreement. I credit Baughman's testimony with respect to these matters.

Local 702's June 3 letter to the Company and position statement of June 4 are significant in this regard. Local 702 Attorneys Singer and Teitelbaum could not have prepared the respective letters without obtaining their information form Miller or Roan. I attach no significance to assertions in the letters that the parties did not have a union-only agreement or understanding. It is unlikely that Local 702 would so admit in writing at this stage. Therefore, Local 702 chose to characterize the situation as one in which the Company had a voluntary practice of contracting work only to union firms.

I find particularly significant, Local 702's opening statement in its June 3 letter, that "if any proposal the Union made in negotiations with respect to subcontracting could be interpreted as an unlawful proposal prohibited by Section 8(e) of the NLRA, the Union is specifically withdrawing such proposal." If Roan had unequivocally stated that Local 702 was not seeking a union-only subcontracting clause, because such was illegal, then Local 702 probably would have so reminded Baughman in the letter. Rather, Local 702's opening statement suggests that Local 702 made a statement or statements which although possibly ambiguous, could reasonably have been interpreted as proposing or suggesting a union-only subcontracting agreement or understanding. The language of the letter is consistent with Baughman's testimony.

Local 702's June 3 letter and position statement are also significant in that they fail to indicate that on May 7, Local

702 proposed an equivalent wage clause on contracting. If Roan made such a proposal, then Local 702 would have so indicated in its letters. Local 702's failure to do, tends to indicate that Roan did not make the proposal on May 7. The letters also constitute further evidence that Local 702 did not submit the proposal contained in Charging Party's Exhibit 9 during the resumed 1993 negotiations.

The minutes taken at the May 7 negotiating session, further tend to indicate that Roan did not then present an equivalent wage proposal. The principal purpose of such minutes is to enable the parties to record and keep track of contract proposals, responses to such proposals, and tentative agreements, if any. None of the minutes taken by either side indicate that Roan or any other union representative made an equivalent wage proposal.

Among the minutes taken by members of Local 702's negotiating teams, the minutes of Western division Unit Chairman Brice Irving, indicate that Roan may have suggested a union-only understanding on contracting. Irving's minutes, although fragmentary, indicate that after the first recess, Baughman said regarding subcontracting: "not going to change. Not just union. More protection than what you had." Irving did not indicate any response by Roan to this statement. An inference could be drawn, that Baughman was responding to suggestion of a union-only understanding.

Irving was not called to testify in this proceeding. The General Counsel and Local 702 offered no explanation for their failure to call him as a witness. In contrast, the General Counsel presented testimony to explain why Business Representative Joe Craddock (who was not present at the May 7 session) was not called as a witness. The inference is warranted, and I so find, that if Irving had been called as a witness, his testimony would not have been favorable to Local 702.

I have also taken into consideration the inability of the General Counsel's principal witnesses to agree on just what Roan allegedly proposed. As indicated, Miller testified that Roan referred to equivalent wages, whereas Roan testified that he proposed equivalent wages and benefits.

Nevertheless, I find upon consideration of the totality of the evidence, that Local 702 did not engage in inside game activities for an object of forcing or requiring the Company to enter into a "hot cargo" agreement prohibited by Section 8(e).

At the May 7 negotiating session, Local 702 did not propose a union-only contracting agreement or understanding. Rather, in response to Baughman who first raised the matter, Miller agreed that he would like to see restoration of the former gentlemens' agreement. Roan simply indicated that the parties could have such an understanding.

In the context of Local 702's overall course of conduct, including the extended discussion on May 7, it is evident that Local 702 was concerned first and foremost with erosion and loss of what it regarded as unit work, through subcontracting. Local 702 regarded a union-only contracting understanding as one means, but not the only means, of stemming such erosion, by removing the incentive, i.e., lower labor costs, for subcontracting unit work.

In 1992, Local 702 proposed a clause proscribing subcontracting to avoid a reasonable amount of overtime work for unit employees. Local 702 alternatively proposed a clause which required equivalent wages, benefits, and working conditions. Although Baughman declared that the Company would no longer honor the gentlemen's agreement, Local 702 abandoned or withdrew both proposals upon Baughman's assurance that the Company would not contract out work at substandard wages. Instead, the parties tentatively agreed to add two additional restrictions to the restriction already contained in section 1.03 of the division contracts. The three

restrictions were directed at preventing layoff, loss of pay or dislocation of unit employees. None pertained to the identity, union or nonunion status, or terms and conditions of employment of prospective subcontractors.

In subsequent discussions, Miller and Baughman disagreed as to whether Baughman, by indicating that the Company would not change its subcontracting practices, implied that the Company would not contract out work to nonunion arms. However, the actual catalyst for reviving subcontracting as an issue in the negotiations, was the eastern division grievances concerning the Matoon janitorial work and pouring concrete for the transformer pad at Charleston.

The thrust of both grievances was that the Company contracted out unit work. Miller argued that the Company violated its June 1992 understanding with Local 702 by contracting out work at substandard wages. Miller did not even know whether the contractor who poured the concrete was union or nonunion. However, by agreeing to let the contractor pour concrete for the transformer pad without extra charge, the Company was in effect reducing its pertinent labor costs to zero, i.e., less than $4 or $5 per hour. Local 702 did not object to the contractor performing any other work.

By late January 1993, when the parties resumed contract negotiations, the differences between the parties over subcontracting were fully apparent. Nevertheless, Local 702 made clear that it regarded subcontracting as a relatively minor issue, and no obstacle to contractual agreement. Local 702 by its proposals, made clear that the parties could reach agreement onthe basis of the 1992 tentative agreement, if the matter of Medical insurance premiums was resolved in a satisfactory or acceptable manner. Therefore, I do not credit Baughman's assertion in his testimony, that prior to May 7, he believed that the parties would have a contract if the Company withdrew its proposals for Medicare carve out and mirror image.

As discussed, Local 702's March 1993 proposal for some form of Newton contract language, is particularly significant. The Newton clause is plainly addressed to preservation of unit work. There is no contention that the clause is unlawful. Nevertheless, Miller proposed the clause as a possible basis for resolving the subcontracting issue. The Company chose to ignore the proposal.

Testimony concerning the union ratification meetings in April, demonstrate that the subcontracting issue was a minor consideration, if a factor at all, in determining the outcome of the ratification vote. When employees asked about the gentlemen's agreement, Roan answered that the agreement was illegal and unenforceable. So far as indicated by the present record, that was the end of the discussion on this point. Roan presented the problem as one of work preservation, threatened by contracting out of work at substandard wages. Moreover, prior to the May 7 session, Roan did not plan to talk about subcontracting, let alone a union-only understanding. Prior to the session, he advised Miller to focus on the health care issues. Roan talked about subcontracting only because Baughman raised the matter of union-only subcontracting. The Company did not allege that Local 702 was seeking an unlawful hot cargo agreement until June 2, by which time the employees were locked out. Therefore, it is evident that by voting in favor of inside game activities, the employees could not, even in part, have done so in support of a nonexistent union proposal.

As indicated, at the May 7 session, when Baughman asked about the problem of subcontracting, Miller referred to the eastern division grievances. He posed the problem as one of deprivation of unit work, including overtime, i.e., "when," and subcontracting work performed at substandard wages, i.e., "who."

Local 702's subsequent discussion of jurisdictional disputes, further tends to indicate a lack of motivation to

control the labor relations policies of company subcontractors. Local 702 indicated that it generally had no problem with subcontracting to firms represented with IBEW. However, the union representatives explained that by following a practice of contracting out work, the Company risked becoming enmeshed in jurisdictional disputes, in which case, the unit employees might honor construction union picket lines. This would cause "big problems." In sum, Local 702 sought to persuade the Company to generally avoid subcontracting of work to non-IBEW firms, whether union or nonunion.

I have also taken into consideration, accumulated and unresolved Newton grievances concerning subcontracting, which were on the table in the contract negotiations. In all of these grievances, Local 702 was contending that the Company had no right at all to contract out the work. Some of the jobs in dispute had been contracted out to union firms, including one job contracted to a firm whose employees were represented by IBEW. Other jobs had been assigned to division unit employees. The present issue involves the divisions. However, it is unlikely that Local 702 would adopt a radically different approach with regard to unit work, as between the Divisions and Newton. I find that the Newton grievances tend to indicate on the part of Local 702, and overriding concern for preservation of unit work, rather than concern to control the labor relations of company subcontractors.

I have also found significant, Local 702's response to the Company's unfair labor practice charges. Local 702 promptly declared withdrawal of any proposal which could be interpreted as violating Section 8(e). Local 702 revived and resubmitted its prevailing wage proposal. When the Company asserted that this proposal was also unlawful, Local 702 promptly revised its proposal in a manner which was undisputedly lawful. The Company withdrew its charges, but

the lock out continued. Local 702's actions were inconsistent with a determination to obtain an unlawful hot cargo agreement.

In sum, Local 702 and the unit employees did not engage in inside game activities in order to obtain an unlawful hot cargo agreement. As previously discussed, Local 702's proposals with regard to subcontracting, played no part in the Company's decision to lock out its employees. That decision was based solely on the inside game activities, and not onthe substance of Local 702's contract proposals.

E. What was the Nature and Extent of Concerted and Union Activities Engaged in by the Unions and the Employees During the Period from April 24 to May 20?

Company President Greenwalt testified that the only reports he received concerning a work slowdown after April 24 were that: (1) employees were taking much longer than before to check their trucks, and (2) employees were asking about things they had previously done for years. Quincy area superintendent AnKrom, in his testimony characterized the work-to-rule practices as "malicious obedience," meaning that the employees were following the rules, but doing so spitefully. In sum, he was saying that the employees did the right thing for the wrong reason. He admitted that employees were supposed to follow the rules. Manager Baughman testified that the employees were strictly following company rules.

The Company presented some 42 witnesses who testified concerning conditions during the period from April 24 to May 20. Notwithstanding the above testimony of Greenwalt, Ankrom and Baughman, the Company sought to show in sum that in addition to overtime boycott (which will be further discussed), employees in furtherance of the Unions' contract demands, engaged in excessive and unreasonable work-to-rule practices, work slowdowns, including loafing on the job,

and actions which could be characterized at best as carelessness, and worst, as sabotage. None of the witnesses testified as to alleged unwarranted, work-to-rule practices among Local 148-represented employees.

In support of these contentions, the Company relied principally on the subjective observations or alleged subjective observations of its supervisory personnel. The Company so concedes in its brief. The Company's brief is punctuated by such phrases as "it appeared," and supervisors "observed." For example, the Company asserts (Br. p. 43): "It appeared to supervisors in all three divisions that unit members were taking longer to perform tasks than they would ordinarily have taken, and that this was frequently the result of superfluous motion or unproductive time."

However, the Company also relied on its own records. Specifically, in four instances, the Company produced such records in order to support its assertions. In each instance, the records failed to do so. Rather they tended to show the opposite. I shall at this point, discuss the records, and relevant testimony by company witnesses.

Matoon (eastern division) superintendent Roger Willis was the Company's leadoff witness. Willis testified in sum as follows: During the period from April 24 to May 20, he became aware that employees were parking their trucks (those who normally took their trucks home), not taking overtime, slowing down production, asking supervisors for instructions, working to rule, turning in an abnormal number of problem reports on vehicles, and taking an abnormal amount of time in leaving for their jobs. He personally observed employees taking abnormal amounts of time. Although the number of problem reports was unusual, none appeared to be contrived, and the employees' conduct was proper. None of the employees were disobeying orders. In his testimony, Willis was unable to explain how employee engaged in work-to-rule practices.

Willis further testified in sum as follows: He complained to his superior, Eastern Division Manager Jack Herren, about the situation. Willis wanted to discipline employees. Herren told him not to impose discipline, because the Company did not want to do anything to impede getting a contract. Therefore, Willis did not discipline any employees. However, Herren agreed to accompany Willis on an inspection tour of area jobs.

Willis and Herren testified in sum as follows: On this tour, they observed employees taking breaks when they should have been working, or at places where they had no evident reason to be present; or they were unable to find employees at places where they should have been working. Willis questioned or admonished some of the employees. One crew said they were on their authorized break, another, that they were checking out a line, and a third, that they were sizing up a job. Another crew admitted that they should have been working and went back to work. Willis testified that he examined employees' work sheets, but that he did not find from such records, that some of the employees were not pulling their load. He initially avoided testifying that he relied in whole or part on company records, in concluding that unit employees were wasting time or otherwise acting in an unproductive manner. He testified that he drew this conclusion on the basis of personal observation.

However, Willis testified that after May 20, he took into consideration, the Company's division work authorization (DWA) records, in making his determination. These records, which serve as work orders, are used for jobs having a cost estimate of at least $8000. They contain estimates of the time needed to complete each job, coupled with completion reports showing the actual time taken on the job. Willis in his testimony, indicated that he had no reason to question the accuracy of the reports.

At the hearing, Local 702 requested and the Company produced, pertinent available DWA's. The DWA's produced, and presented in evidence by Local 702, pertained to the Hamilton line crew. Willis testified that he received reports that the crew was taking too long to perform its underground service work.

The DWA reports for the period from April 24 to May 20 covered nine jobs, of which five indicated a projected time estimate (three of the others were relatively small projects). All of the five with estimates, were completed in significantly less than the estimated time. Willis initially testified that the remaining job (the underground service work) was the only one which reflected low productivity. However, he subsequently admitted that this job was completed in significantly less than what he would regard as estimated time.

Local 702 also presented in evidence, DWA's covering Hamilton crew jobs during the period from March 1 through April 23. One of the jobs was actually performed during the inside game period, and in significantly less than the estimated time. Of the remaining five jobs, one was completed in significantly less than estimated time, and the others in slightly less than estimated time. In sum, the records in evidence indicate that the crew's productivity was better after April 24 than it had been prior to that date.

The Company offered to prove that the DWAs were inaccurate in part, although its offer of proof would not have materially affected the overall picture shown by these reports. I rejected the offer, in light of Willis' testimony that he relied upon the reports, and did not question their accuracy, including the very figure challenged by company counsel. I find that the DWA's evidence that there was no work slowdown during the inside game period, and undermine the credibility of Willis' assertions concerning alleged work slowdowns.

Robert Gillette was senior mechanical maintenance supervisor at the Coffeen power station. Gillette testified in sum as follows: He concluded that the pace of work by the Local 148 represented employees was slowing down. Work was not getting done. Employees seemed to be milling around, or clustered in small groups. On May 11, he discussed the situation with his subordinate mechanical maintenance supervisors. He requested them to prepare day-by-day and employee- by-employee comparisons of the amount of work expected to be performed, vis-a- vis work actually done.

The Company presented the supervisors' written reports in evidence. As Gillette not prepare the reports, the Company initially proffered them to show his state of mind. However, the Company subsequently presented testimony by William Jurgena and Keith Riggs, two of the supervisors, concerning their respective reports. Their testimony, coupled with the reports, failed to indicate any work slowdown, and specifically, any decline in employee productivity, other than overtime refusals, which could be traced to the inside game activity. And this, despite the fact that some of the figures for work expected to be performed, were demonstrably arbitrary.

Jurgena testified in sum as follows: On May 13, the first day he prepared a report, his employees were working as a group. Collectively they put in 7 hours of work for an expected 8 hours, which Jurgena regarded as good performance. One of the employees (Thacker) normally a poor performer, did well above his average. The following day (May 14) all but one of the employees performed at their normal levels (typically, about 6 hours' work for an expected 8 hours). The remaining employee (Golden) who normally did 5 hours of work, put in 4 hours of work that day. The reports for May 15 he indicated that all employees performed at their normal level. (There were no reports for May 16 and 17. Evidently these were days off for Jurgena's group). Only on May 19, the last day of his reports, did Jurgena indicate

that the employees generally performed below expectation. Jurgena indicated that 9 of 10 employees each put in 4 hours of work. However, Jurgena admitted that progress on the jobs in question may have been affected by missing parts, and the overtime boycott.

Supervisor Riggs testified, and his reports so indicated, that for the days he prepared reports (May 13, 14, 15, 16, and 17), the employees under his supervision fully or generally met his work expectations. Some employees exceeded his expectations. Riggs admitted that it was not unusual for jobs to take longer than the estimated time. He was unable to explain why, in some instances, his figures for projected work time varied for specific jobs.

Moreover, as Gillette and Jurgena admitted in their testimony, productively has long been a problem at Coffeen. From November 1992 to January 1993, an outside consulting firm conducted a productivity survey of the Company's Coffeen, Meredosia, Hutsonville, and Newton power stations. The survey indicated that Coffeen had the poorest record for utilization of work time. The survey determined that 31.8 percent of maintenance mechanics' time was spent on breaks or other idle time. The reports inferentially placed the responsibility on management, recommending better maintenance planning, tighter supervision, and improved maintenance and work schedules. The evidence fails to indicate that the Company ever effectuated these recom-mendations. Gillette testified that it was common for employees to have to wait for work assignments, or for projects to be delayed by need to obtain materials or parts, or by awaiting completion of other jobs.

Company supervisors testified concerning instances of missing or damaged items or equipment, ostensibly suggesting calculated carelessness or sabotage. Most of the alleged incidents occurred at the Newton, Coffeen, or Grand Tower power stations.

Charlie King was material handling (coal yard) supervisor at Newton. King testified concerning alleged or ostensible employee dereliction. He testified, among other matters, that employee vehicle operators failed to smooth down rough roads, thereby impending progress of vehicles, that when reclaiming coal from piles, operators would dig deep gouges instead of making smooth cuts, and that instead of filling four buckets of sludge, operators would drive away with only two or three full buckets. King further testified that in late April, an operator was unable to start a locomotive because the main fuse was missing. King asserted that although the locomotive had been in use since 1978, there had never previously been a situation where a fuse was missing.

Unlike other supervisor witnesses, King testified that he kept a work diary in which he recorded, in addition to his hours, any extraordinary events which occurred at work. King produced his diary, and Local 702 introduced in evidence, his entries and other notes for the period from April 19 to May 23, showing unusual events, other than overtime refusals. The diary indicated that the fuse was discovered missing on April 23, i.e., prior to contract extension expiration and commencement of inside game activity. King recorded only one other unusual event prior to the lock out. On May 2, an operator reported a stalled bulldozer. However, King did not rely on such an incident in his initial testimony concerning alleged employee derelictions. Rather, he complained that employees failed to report equipment breakdowns.

Senior mechanical maintenance supervisor Gillette also had problems in establishing the dates of alleged ostensible calculated carelessness or sabotage at Coffeen. Gillette initially testified that about 7 to 10 days before the lock out, Supervisor Jurgena discovered that coupling bolts were missing from the main turbine. He further testified that about the same time certain packing seals were also determined to be missing. However, Jurgena testified that he was unable to

find the bolts about April 25 or 26, and that in searching for the bolts he also determined that the segment of packing was missing. Gillette changed his testimony, asserting that the parts were determined to be missing prior to April 27, when the matter was discussed at a staff meeting. On that date, Plant Superintendent Fowler posted a notice to employees concerning "recent incidents" involving damage to company property and parts removed or hidden.

With respect to the alleged damage to company property, Gillette testified that a tire was cut on a dump truck, and that the cut was apparently caused by a sharp metal object. Gillette testified that the incident occurred 2 or 3 weeks before the parts were missing, i.e., well before the inside game activity.

On cross-examination Gillette further testified in sum as follows: Local 148 assisted in searching for the missing bolts. The bolts were used in the turbine deck, which is about the size of a football field. Items are normally scattered about the area, and sometimes misplaced. The missing items were subsequently replaced, and their loss did not delay the ongoing scheduled outage (the pertinent operation). He did not know who was responsible for loss of the items. At the time, subcontractor personnel were working on the premises. In the early 1980s a 60-pound pump (larger than the instant missing items) was lost during a scheduled outage.

With regard to the cut tire, Gillette further testified in sum as follows: cut tires were not unusual. Vehicles were parked near the weld shop, in an area where there might be pieces of broken metal. There was no evidence that either Local 148 or the employees were responsible for the cut tire.

Coffeen senior electrical maintenance supervisor Fred Ziglar testified in sum as follows: About 1:30 p.m. on May 6 or 7, a piece of copper buss bar was determined to be missing. Unit employees assisted in searching for the item. About 75 minutes later, a unit employee located the item. There was no

evidence that any unit employee misplaced the item. Ziglar did not testify concerning any other alleged missing items.

Supervisor Jurgena testified that the Company did not accuse anyone of deliberate wrong doing, and it was not unusual for tools or small parts to disappear during a maintenance outage.

Upon consideration of the testimony of the Coffeen supervisors, I find that the Company failed to prove either that unit employees engaged in sabotage or calculated carelessness, including misplacing parts or damaging equipment or that the Company had reason to believe that unit employees engaged in such conduct. Their testimony further tends to cast doubt on the credibility of testimony concerning such alleged dereliction at other Company facilities, and specifically that employees allegedly engaged in such conduct as part of a concerted or union campaign in support of contract demands.

In its brief, the Company suggests by way of argument, that the subjective testimony of supervisors concerning their alleged appraisal of employee performance during the period from April 24 to May 20 is more reliable than the Company's records relating to such performance. (Br. at 177; see also Br. at 47, fn 15.) Referring to the productivity survey in late 1992, the Company argues that "comparing the precise standardized results of the 'work sampling study' done by time-motion using with the imprecise, but first-hand observation of CIPS' supervisors is not valid."

I do not agree with this rationale where, as here, the supervisors' alleged opinions are self-serving and the records were compiled by the Company, including the supervisors themselves. Indeed, the records for Coffeen were compiled for the very purpose of determining whether there was a work slowdown. I find that the DWAs', the reports compiled by Jurgena and Riggs, and King's diary, have greater evidentiary

significance than alleged subjective opinions of supervisor witnesses. In sum, the records constitute implied admissions that there was no concerted slowdown or other concerted campaign of intentional carelessness or sabotage.

In addition to company records, other objective evidence, coupled with contradictions among company witnesses, tend to undermine the credibility of assertions concerning alleged deliberate slowdowns or improper work performance. In this regard, I shall at this point return to the situation at the Newton coal yard.

The coal yard is one part of the Newton power station. The coal yard employee complement includes 18 equipment operators (also known as material handlers), and 5 mechanics. The equipment operators have two principal functions. One is to move and stockpile coal, which is shipped to the facility by rail or truck. The second is to transport dirt and sludge (scrubber waste material) to a landfill. Equipment used by the operators includes large trucks, bulldozers, and locomotives for spotting coal. The operators must drive their trucks over unpaved terrain on the facility, between the coal delivery area and the coal pile, and between the scrubber and the landfill. The coal which is received by rail must be moved promptly, as there is a demurrage charge after 12 hours. During the period in question, the Company anticipated a strike in the coal industry, and therefore was stockpiling more than the usual amount of coal.

Newton Operations Supervisor Butler testified in sum as follows: About April 28, supervisors reported that work in the coal yard was extremely slow. Butler decided to see for himself. He went to the boiler room roof, which is 200 feet above the ground. He observed employees hauling sludge from the scrubber to the landfill, a distance of about I mile. The trucks were moving at an extremely slow speed, specifically, 5 miles per hour or slightly higher. The operators should have been going at 20 to 25 miles per hour and when

returning empty, about 30 to 35 miles per hour. The operators also wasted 5 to 10 minutes of time at the landfill.

Butler also testified in sum as follows: He observed the coal hauling operation from his vantage point. The bulldozers were proceeding extremely slowly. The operators seemed to be using only first gear. The bulldozers have eight forward and one reverse gear. Butler testified at one point, that with a full load, they should have proceeded in fourth or fifth gear, and at another point, they should have proceeded in fifth or sixth gear. During the lock out Butler ran bulldozers in fifth, sixth, and seventh gear. The coal trucks were proceeding at about 10 miles per hour, although they should have been going at 20 to 30 miles per hour. Butler did not check as to how much coal was being moved. His vantage point was about one-quarter mile from the coal pile.

Butler further testified in sum as follows: He overheard the driver of a 50-ton truck complain to a supervisor that the road was extremely rough. Butler checked the roadway with a pickup truck, and found that it was "not that rough." If there was a problem with the road, the operator could have used a grader to smooth the road. Employees should normally take 10 to 15 minutes to check their equipment including fluid levels. On one occasion, he observed them taking over 30 minutes. Butler also observed employees talking in groups. When he walked over, they would disperse.

Material Handling Supervisor King, Butler's subordinate and first line supervisor at the coal yard, contradicted Butler's testimony, and his own testimony, in several significant respects. King testified in sum, as follows: The employees did not appear to be taking longer than needed to perform their work. He told the equipment operators that if the roads were rough, they should smooth the roadway. They did so. The employees did their jobs, obeyed all orders, and were not insubordinate. In damp weather, roads had to be scraped two or three times per shift, and sometimes more often. When

roads were rough, the operators sometimes proceeded at less than 5 miles per hour, which was a normal speed. King was satisfied with 10 miles per hour. Speeds of 20 to 35 miles per hour would be excessive.

King further testified in sum as follows: He measured the distance between the scrubber and the landfill, which was six-tenths of a mile. There were two types of bulldozers. One had three forward gears, and the other had three or four forward gears. As discussed, King testified about the manner in which the equipment operators allegedly performed the work in a defective manner.

It is undisputed that within the plant premises, there are signs posted indicating a 10-mile per hour speed limit. Butler testified that the limit applied only to main roads. However, the Company never so informed the employees. During the period from April 24 to May 20, supervisors never told the equipment operators that they were driving too slowly.

Coal yard equipment operator and union steward Harry Diel was called as a rebuttal witness for Local 702. Diel testified in sum as follows: During the period April 24 to May 20, he told the equipment operators to check their equipment carefully, to follow all rules, including the posted 10-mile per hour speed limit, and to adhere strictly to break times, in order to avoid problems with supervision. Prior to April 24, they did not always do so. Operators usually drove at 10 to 15 miles per hour, and less when as frequently was the case, road conditions were bad. Diel never drove to the coal pile at more than 20 miles per hour, as the trucks could turn over. After April 24, the employees adhered strictly to break times, and observed the posted speed limit. Diel also told the employees to report all problems promptly, and this was done. No supervisor complained that problems were not reported. Diel's testimony was based on his observations up to May 12, when he went on vacation.

Diel further testified in sum as follows: After April 24, the work pace was slightly slower, because the employees were carefully checking their equipment and observing the posted speed limit. However, there was no evident loss of production. The coal was used to fuel the Newton power plant. If the coal supply was insufficient, a unit could be shut down. This never happened. To Diel's knowledge, the Company did not have to pay any demurrage charge after April 24. If sludge is not removed in timely fashion from the scrubber, the scrubber, and consequently the plant, would shut down. This did not happen. No supervisor complained that work was proceeding too slowly.

Diel also testified in sum as follows: After April 24, he did not see any unusual storage piles, and specifically he did not see deep gouges cut into the coal piles. The operators had no motivation to do this, as the coal could cave in on the operator and his bulldozer. Supervisors would see if coal was dug in this manner. However, no supervisor complained that coal was not dug properly. During the period after April 24, the scrubber was eight-tenths of a mile from the landfill. The distance varies, depending on the size and dimensions of the landfill. The roadway is typically in poor condition, with ruts (as shown in photographs). If the road is dusty, the operator has authority to spray water. Sometimes the road is slippery from accumulated wet sludge. Equipment operators have no authority to smooth roadways on their own initiative. If the road needed smoothing, the operators would tell a supervisor, who would assign an employee to grade the road.

Diel further testified in sum as follows: Prior to and continuing after April 24, the coal yard had ongoing problems with defective and worn-out equipment, including the locomotive, dumpster for coal cars, and a loader (for sludge removal), which impeded productivity. Employees complained about the equipment. During the lock out, the Company obtained a new locomotive. After the lock out, the

Company rebuilt the old locomotive, and the dumpster, and obtained a new endloader. These changes improved productivity.

I credit Diel. I find upon consideration of the testimony and other evidence, that there was no concerted work slowdown at the coal yard, or calculated performance of work in an improper or unsatisfactory manner, and that production continued to meet the Company's needs. Putting aside the matter of overtime boycott, I find that the only indicated inside game activities by the coal yard employees consisted of reasonable adherence to Company and safety rules, and that the Company had no objective basis for believing otherwise.

In view of the posted speed limit, the employees could reasonably believe that the 10 mile-per-hour limit applied to their operations. The Company never told them otherwise. In fact, adherence to the speed limit had only minimal impact on normal operations. Vehicles normally could not proceed at more than 15 miles per hour, and because of poor road conditions, often had to operate at less than 10 miles per hour. As indicated, Supervisor King admitted that 10 miles per hour was an acceptable speed.

Operations Supervisor Butler's testimony was demonstrably incredible with regard to such matters as vehicle speed and operation of gears on equipment. As first line supervisor, King would be more knowledgeable than Butler with regard to such matters. Butler admitted in his testimony that from his vantage point, he could not accurately determine the speed of vehicles. His testimony in these respects was so incredible as to generally impugn the credibility of his testimony.

As indicated, Supervisor King admitted that the employees did not appear to be taking longer than needed to perform their work. In light of operator Diel's explanation of the coal pile operation, King's assertion concerning improper removal of coal was demonstrably incredible. Diel's uncontroverted

description the defective end loader, tends to credibly explain why operators could not always haul the maximum number of buckets of sludge.

I have also taken into consideration, the total lack of objective evidence to indicate any loss of coal yard production after April 24. As indicated, the Company received unusually large shipments of coal during the period from April 24 to May 20. Nevertheless, no evidence was presented that the Company incurred demurrage charges or that power plant operations were impeded during this period by reason of slow movement of coal or removal of sludge. The absence of objective evidence, and demonstrated lack of credibility of the Company witnesses, further tends to undermine the credibility of company witnesses' subjective assertions regarding employee work performance in other operations and at other facilities.

I have also taken into consideration, the Company's own safety and other rules, Federal and state rules, and testimony by high-level company officials and knowledgeable supervisors, regarding such rules and proper safety practices. I have done so not only with regard to the coal yard operation, but also with regard to other specific operations and general work performance throughout the Company's system, which were subjects of testimony in this proceeding.

The Company has a 92-page book of safety rules for its personnel. The rules include requirements for daily inspection of equipment and testing of equipment. The rule book provides that employees may be disciplined for violating the rules. Manager Baughman testified that employees must follow the rules, and that employees were never disciplined for following safety rules. He further testified that during the period from April 24 to May 20, employees were strictly following the rules. Prior to May 20, he never told the Unions

that employees were engaging in excessive work-to-rule practices.

The rule book, and Illinois Department of Transportation regulations, also contain specific requirements for placements of safety devices and personnel (signs, cones, barricades and flagmen) when personnel are working at or adjacent to public roadways. The Illinois Department of Transportation also issues a commercial drivers license study guide. That category includes company personnel who operate large equipment trucks, as they are required to have commercial drivers' licenses. The guide states that drivers should inspect their vehicles at the end of each trip, day, or tour of duty of each vehicle, and to report any problems. The guide sets forth, in great length and detail, the proper inspection procedure. It is evident that if followed literally, the inspection procedure could take as much as 2 hours; and that even a cursory version of the inspection procedure, e.g., substituting visual for manual inspection of nuts and baths, take 30 minutes, or more if corrections were needed.

The Company correctly points out in its brief (Br. at 204), that the guide provisions do not have the force of law. Under Illinois law, operators of commercial motor vehicles used in intrastate commerce are exempt from the detailed reporting requirements of 49 C.F.R. 396.11. However, they are subject to the requirement of 49 C.F.R. 396.13, that before driving a motor vehicle, the driver must: "Be satisfied that the motor vehicle is in safe operating condition." See, 625 ILCS 5/18 b 105, and 92 IllAdm.Code Ch. 1, Sec. 396. 2000(C).

Although the guide provisions are not legal requirements, they nevertheless constitute part of the standby preparation for obtaining a commercial driver's license. The Company never told its drivers that they were not expected to comply with the detailed inspection procedure, and the guide itself does not indicate any exemption for operators of vehicles in intrastate commerce. Moreover, as conceded by the Company's most

knowledgeable witnesses, the determination of how much inspection and checking is needed, is one involving considerable discretion, and it would be difficult or even impossible to fault any operator for the amount of time and care taken for those purposes.

Two of the Company's witnesses were safety supervisors. Their testimony is particularly significant. Jim O'Daniel is safety supervisor for the southern division and Edward Pointer for the western division.

O'Daniel testified in sum as follows: After April 24, he received more questions from employees concerning safety rules and company policy. He also received requests for testing equipment, and considerable ordering of highway safety devices. On one occasion, he observed that an employee was taking an excessive amount of time to check a bucket truck. However, the employee may not have been familiar with the testing procedure.

O'Daniel further testified in sum as follows: At a safety meeting on April 26, the employees were very vocal in asking for interpretations of the safety rule book, and testing procedures. O'Daniel told the employees that he was pleased with their interest in the safety rule book, and he would support them in following the rules but they should not "screw" with him, meaning, that they should continue on this course after the labor dispute was resolved. O'Daniel provided safety equipment if needed. He told employees that if they felt equipment was unsafe, they should not use the equipment until it could be inspected. Equipment should be checked daily. He never told employees to shortcut their checks. If employees felt that close inspection of equipment e.g., manual check of bolts, was needed, he would back the employee. In sum, O'Daniel, in his testimony, made a persuasive case in support of work-to-rule practices.

Safety supervisor Pointer testified in sum as follows: He observed that employees were putting more effort into

checking bucket trucks. On one occasion, he saw a line clearance crew spending about 1 hour checking their equipment. They were not so thorough before April 24. However, they were following the safety rules. Pointer did not testify that the employees acted unreasonably or improperly.

In light of the testimony of O'Daniel and Pointer, it is evident that the Company's safety supervisors generally saw no problem with employees working to the rule. And in light of Baughman's testimony, it is evident that employees risked discipline if they failed to observe safety rule book requirements, and that Local 702 was correct in cautioning its members that they should be meticulous in this regard, as they would be working without benefit of a grievance-arbitration procedure.

Quincy (western division) area electrical operations supervisor Carroll McElroy testified that employees did their regular work after April 24, and the only change was that employees refused overtime. Tuscola (western division) district superintendent Jay Houvenangle, was the Company's second witness. Despite leading questions by company counsel regarding the matter of slowdowns, Houvenagle testified, in sum, that the only unusual activity of which he was aware, after April 24, was that: (1) employees stopped taking overtime; (2) employees engaged in informational picketing prior to reporting to work at 8 a.m.; and (3) utility employees parked their trucks at the end of the workday. Paxton (eastern division) area operations supervisor Wesslund similarly so testified.

With regard to the second matter, employees have a statutorily protected right to engage in informational picketing of their employer outside of their working hours. *Foley Material Handling Co.*, 317 NLRB No. 70, JD at 10 (1995); *Wolfie's*, 159 NLRB 686, 694-95 (1966). As for the third matter, it is undisputed, and company witnesses so testified, that employees who normally took their trucks home with

them, i.e., who were subject to call out overtime, had no obligation to do so. Indeed, supervisors requested employees to park their trucks, and thereby them available for supervisory personnel, if they did not intend to take overtime (The reason for the practice of employees taking their trucks home, will be discussed in connection with the question of overtime as mandatory or voluntary).

Testimony and documentary evidence was introduced concerning formal disciplinary action taken respectively, in Local 148 and Local 702 represented units. The first was at Coffeen, and the second at Lawrenceville, in the eastern division.

On May 5, Supervisor Ronald Paisley issued formal, recorded "verbal" reprimands to 11 Coffeen employees, allegedly for "idling (work slow down)." Two were allegedly sleeping on the job. On June 21, when Local 148 and the Company signed their contract, they discussed the discipline. Coffeen chief steward Don Sweet explained the circumstances, and why the discipline was not warranted. After consulting with Plant Superintendent Fowler, Manager Baughman agreed to rescind the reprimands.

On May 19, Area Superintendent R. G. Edmonds issued a formal "counseling letter" to Lawrenceville line clearance crew foreman Ralph Bowersock, confirming a discussion on May 13. The letter reviewed what supervision regarded as Bowersock's poor work performance and attitude in the "last few weeks," including evident intentional delay in getting work done. Edmonds admonished Bowersock, among other things, that he was expected to lead his crew to observe all safety and work rules. Edmonds warned Bowersock that he must change, or risk loss of his foreman's position, and possibly his job. Copies of the letter were sent to the supervisory chain of command, including manager Baughman.

It is evident, and I so find, that regardless of the merits, neither disciplinary action had anything to do with the inside game activities. The present record is replete with assertions by company witnesses that the Company decided not to discipline employees because of such activities, and that supervisors were frustrated because they were not permitted to administer discipline. Nevertheless, higher management approved or acquiesced in the discipline. Area Operations Supervisor Steve Jacobs, who was involved in the Bowersock discipline, testified that he felt free to send such letters. Jacobs thereby contradicted his previous incredible testimony that, absent Division Manager Herren'sinstruction against discipline, he would have reprimanded Bowersock. In fact, Bowersock was reprimanded.

Moreover, as testified by Lawrenceville Superintendent Picaut, who also participated in the disciplinary action, the Company had problems with Bowersock's performance, which predated April 24. Picaut testified that problems at Lawrenceville basically related to Bowersock and his crew. I also find significant, Edmond's warning about adherence to all safety and work rules. This came at a time when the employees were urged by Local 702 to adhere strictly to such rules. Edmond's counseling letter further tends to confirm that Local 702 had good reason to do so.

Some company witnesses seemed unable to decide whether to accuse the employees of adhering strictly to safety and work rules, or failing to do so. Danny Boirum, then a customer service representative stationed at Paris (eastern division), testified at one point that prior to April 24, employees used short cuts, and at another point, that prior to April 24 they followed the rules. Pana (eastern division) Area Operations Supervisor Dennis Swan testified at one point with regard to mechanical problems, that things slid, and at another point that employees were checking their trucks in accordance with safety rules. Swan further testified at one

point that general maintenance was not being performed, and at another, that employees were trying to be safe, in his view in order to make a point. He testified that he could not say that any employee purposely failed to report a problem. Macomb (western division) Area Operations Supervisor Reynolds variously testified that some employees were strictly following the rules, including checking booms, that prior to April 24 they checked booms at the jobsite, and that he did not know whether they did so prior to April 24. Reynolds also testified that crews were calling in to question whether locates had been made for situating poles, although previously he did not have such problems. However, Reynolds admitted that crews might have difficulty in making such determination at times such as the period in question, when grass was mowed.

There were material inconsistencies in the testimony of company witnesses with regard to other aspects of conditions during the period from April 24 to May 20. Anna (southern division) District Superintendent Gary Dennison testified that on April 28, an employee left his truck at the jobsite, which Dennison had never seen happen before. Carbondale (southern division) Area Superintendent Harry McLeod testified in sum, that he initially had problems with the way in which returned trucks were parked, but that things soon "settled down," and supervisors were able to get their equipment.

Southern Division Electric Operations Supervisor William Newman testified that he observed employees "milling around" a street lighting job, and not doing productive work. He initially testified that the employees placed more than the required number of cones, but subsequently admitted that he did not know the safety requirements. Newman testified at one point with regard to alleged decline in productivity, that after the lock out, he compared projected work time estimates with time slips. At other points he testified that he did not

review or compare such records. Newman testified, in sum, that excessive time was taken, and there were serious cost overruns, on the Clifford Tap project. The job began about early March 1993 and was completed in the spring of 1994. Newman admitted that his information was based on hearsay, he made no comparison of projected versus actual time and costs, and he did not know what factors caused the problem. He did not produce any records. In light of Newman's contradictions and admissions, I am unable to attach any credible weight to Newman's asserted subjective observations concerning slowdowns or other deficiencies.

Boirum's testimony displayed similar weaknesses. Boirum testified in sum that things seemed to slow down, employees seemed to forget material, and keep returning to the storeroom, and would not do extra tasks. Boirum was unable to relate his alleged observations to any specific jobs. He admitted that employees followed all orders. He testified that employees were supposed to check their trucks daily, but he did not know whether they did this either before or after April 24. Boirum testified that about 2 weeks before the lock out, he checked DWA records. However, Boirum did not make any specific findings, and Company did not offer to produce the records. As with Newman, I find, in light of Boirum's contradictory testimony, admissions, and failure to produce corroborative evidence, that I am unable to attach credible weight to his testimony concerning alleged observations and appraisals of work performance.

As indicated, there was an ongoing scheduled maintenance outage at Coffeen. The outage commenced about March 1, was scheduled for completion on May 31, and was in fact completed by June 2 or 3 (during the lock out) i.e., almost on schedule. Gillette testified that as of May 20, the outage was 8 to 10 days behind schedule. On May 13, Gillette complained to chief steward Sweet that the Company was not getting overtime work and would have to subcontract part of the

outage work. He did not complain of a slowdown.[38] Sweet told him to do what he had to do. It was not unusual for the Company to subcontract portions of the scheduled outage work, although historically, Sweet would try to persuade against, subcontracting. The Company did subcontract outage work. Supervisors also performed overtime work. In light of Gillette's explanation to Sweet, it is evident that if the outage was behind schedule, the delay was caused by the overtime boycott and not by any work slowdown. The Company compensated for such delay by subcontracting, overtime work by supervisors, and prioritizing other work.

Gillette further testified that employees seemed to be milling about, and that unusually large numbers of employees were waiting at the storeroom. Gillette admitted that when he inquired as to the problem, the employees truthfully explained, on one occasion, that they were waiting for a crane operator, and on another occasion, that no one was attending the storeroom. It was not unusual for long lines to be waiting on Mondays, when no person is regularly assigned to the storeroom.

Gillette also testified that in early May, welder repairman B. J. Irvin was unwilling to operate a crane because the remote control was inoperable. Irvin would have to operate the controls manually. To do so safely, Irvin would have to refamiliarize himself with 17 hand signals set forth in the safe practices manual. Nevertheless, Irvin obeyed Gillette's order to operate the crane. Plainly, Irvin was not malingering. Gillette testified that no employees refused to perform their assigned tasks.

As indicated, manager Baughman told Local 148 business manager Giljumthat he was not alleging sabotage. Vice

---

[38] On another occasion, Gillette complained about low productivity. He made such complaints before April 24. As discussed, productivity had long been a problem at Coffeen, and the outside survey inferentially placed the responsibility on mangement.

President Dodd testified that the matter of missing parts involved only the Local 148 unit. Nevertheless, the Company presented testimony concerning ostensible or possible calculated carelessness or sabotage at both Local 148 and Local 702-represented facilities. As discussed, the evidence fails to demonstrate even reason to believe that Local 148-represented employees engaged in such misconduct at Coffeen.

Carbondate Area Superintendent McLeod and southern division substation engineer John Baker testified in sum, concerning missing equipment and trucks and cranes which failed to start. However, Baker testified that such startup problems also occurred before April 24, and before the current labor dispute. McLeod testified that both the missing equipment and startup problems occurred during the first week of the inside game activity. He further testified that he warned employees that such incidents would be thoroughly investigated, and that thereafter, he had no further such problems. Anna (southern division) District Superintendent Gary Dennison testified that he saw no sabotage, and that employees could take their personal tools home with them. Southern Division Safety Supervisor O'Daniel testified that employees commonly keep their tools in different places on their vehicles, as well as taking personal tools home. In sum, the evidence fails to demonstrate any campaign of calculated carelessness or sabotage in the divisions.

The Company also presented testimony concerning ostensible carelessness or possible sabotage at the Newton and Grand Tower power stations. In this regard, I have taken particular cognizance of the testimony of Newton Supervisors Ash and Scott Laugel, Grand Tower Assistant Superintendent Douglas Stamm, and Grand Tower Superintendent Simpson.

As indicated, the Company also relied on statements by unit employees.

Carbondate Area Superintendent McLeod testified that he told foreman (unit employee) Steve Delaney that he wanted a minimum of 80 units of work; whereupon Delaney responded that this was all that would be accomplished. A unit of work equals 6 minutes. Therefore, McLeod's remark could reasonably be interpreted as meaning that McLeod expected the employees to put in a full 8-hour day. Therefore, Delaney's response simply indicated that Delaney or the employees would not be taking overtime work, as was the situation.

Coffeen Supervisor Jurgena testified that after the lock out, welder Roger Cole told him that prior to the lock out, he had taken home a pin every night. Such pins were used in replacing a central valve seat. Jurgena testified that Cole was obviously joking. There were no pins missing from the project. Newton Mechanical Maintenance Supervisor Richard Patterson testified that when he complained to repairman Perry Price that it didn't look like they were doing much work during the day, Price responded, using profanity, that he wasn't doing anything, and there was nothing Patterson could do about it. Patterson testified that Price generally had a sour attitude, and used profanity.

Southern Division Gas Construction Supervisor David Grogan testified that when he complained to crew leader Carl Vincelette that his performance was not up to par, and he was taking too long on his jobs, Vincelette responded: "We are trying to get a contract here. You've got to understand my position. I am feeling a little pressure to slow down here." Coffeen Supervisor Gillette testified that about May 1, he told Local 148 steward Jim Beck that he needed the employees to cooperate in working overtime, and there appeared to be a slowdown. Beck responded: "no contract, no work, you understand, you know how it is."

Remarks such as those of Vincelette and Beck, may fairly be considered as evidence of a slowdown. However, the

critical question is not what individual employees said. Rather, the critical question is what the Unions and the employees actually did. In this regard, the evidence indicates that both Unions sought to carefully restrict the inside game campaign to actions which they believed were permissible, and without abandoning the campaign, were cooperative in getting work done. I have previously referred to assistance by Coffeen employees in searching for a missing part. Testimony by Olney Area Supervisor Jacobs concerning an incident about a week before the lock out, is also illustrative.

Jacobs testified in sum as follows: At Effingham, a crew worked overtime on an outage until dark, they were told to return at 5:30 a.m. the next day. At about 7 a.m. Jacobs received a call from Local 702 assistant business agent Phillips, who asked what they were doing. He said he would have to put up a picket in Olney (not at the jobsite). Phillips asked if the employees could begin work at 8 a.m., and thereby not have to work overtime. Jacobs said that he needed maximum daylight, but would begin at 8 a.m. if the job could get done. Phillips agreed to call off the picket. The employees reported to work at 8 a.m., and completed the work, doing a good job.

General Counsel witness Robert Pachesa testified concerning another instance of employee cooperation. Pachesa was a journeyman electrician at Coffeen, Local 148 steward, and former business representative. Pachesa testified in sum as follows: In early May, he and other employees talked with Plant Superintendent Fowler about the fact that supervisors had performed certain overtime work. They asked why unit employees were not given the work on straight time. Fowler said that he did not want to take them off of other jobs. The employees said that if overtime was really needed, they would do the work. However, they felt the job in question could have been postponed. About 2 days later, Pachesa reminded Fowler that the employees would work

overtime if they had to. Fowler was not presented as a witness in this proceeding, and Pachesa's testimony was uncontraverted.

None of the Company witnesses accused the employees of insubordination during the period from April 24 to May 20. Notwithstanding the overtime boycott, when employees were given a direct order to work overtime, they complied. Superintendent Dennison testified that when foreman Walter Jackson said his crew could not go on a job because they would have to work beyond 5 p.m., Dennisen ordered them to go and they did. Supervisor Grogan testified that on the one occasion during the period when he ordered a crew (the Vincelette crew) to work overtime, they did so. Therefore, I attach no significance to manager Baughman's testimony, in sum, that he anticipated a strike because on May 19, Matoon employees had been ordered to report for overtime work at 6 a.m. the next day. The Company had already decided on a lock out, and the lock out began before the Company could learn whether the employees would report to work.

General Counsel witnesses testified in sum, that the inside game activities on the job consisted of overtime boycott, and, in the Local 702 units, proper adherence to safety and work rules. They further testified in sum that otherwise, they performed their work as before, there was no work slowdown, and to their knowledge, no intentional carelessness or sabotage. The witnesses included employees from various units, who also served as stewards or other union functionaries.

Longtime western division meterman and union functionary William Braden testified that the employees worked to rule and refused overtime, and were never warned or disciplined about their actions. Southern division gasutilityman and steward Frank Mondino testified in sum, that he and other employees worked to the rules, he was more systematic than before in checking trucks, and took care to

place the proper number of traffic cones and barricades, he declined overtime, he did not otherwise slow down in his work, and neither he nor any other southern division employee, to his knowledge, were warned or disciplined for their actions. Mondino further testified that about May 25 (during the lock out) Supervisor Larry Schafer (not called as a company witness) told him that he had no problems with the way the employees were working.

Long time southern division substation electrician and union functionary Martin Lee testified in sum, that he and other employees refused overtime, that he always worked safely, but after April 24 was more diligent in checking equipment, and that to his knowledge, there was no other slowdown, and the work got done. Lee further testified that supervisors never complained to him about a work slowdown, or told him that employees had to work overtime although engineer Baker said, with reference to a refusal by employees to work past 5 p.m. (overtime) that someone had to do the work, specifically, the nonunit substation engineers.

Newton electrician and former steward John Koehler testified that he followed the rules as before, that Local 702 encouraged him to do so, that other employees performed the same way, and there was no slowdown. Koehler was not offered overtime work. To his knowledge, none of the maintenance employees worked overtime.

Among the Local 148 employee witnesses, Coffeen maintenance mechanic Dan Sweet (then chief steward, and now Local 148 president), testified that he saw no evidence of sabotage or slowdown, and that work was performed as before, except for employees declining overtime. Coffeen repairman and steward James Beck testified that he saw no slowdown, employees did not change their work practices, and he was unaware of any sabotage. Sweet and Beck each testified that they heard about a missing bolt, but did not otherwise hear anything about missing parts. Beck testified

that it was common for parts to be lost during a scheduled outage, as parts were scattered over a large area. Coffeen electrician Pachesa also testified that he had no knowledge of any sabotage. Pachesa testified that employees did not engage in any slow down or work-to- rule practice, and that their only unusual action consisted of turning down overtime.

I credit the testimony of the employee witnesses. I find that there was no work slowdown campaign in either the Local 702 or Local 148 units. As discussed, I have taken numerous factors into consideration in reaching this finding, including the admissions and contradictions in the testimony of company witnesses. The Company failed to corroborate the assertions of its supervisors with records or objective evidence. When such records and objective factors were presented in evidence, sometimes with Company reluctance, they invariably evidenced not simply the absence of a work slowdown. Rather, they demonstrated that work was progressing at a normal or better than normal pace, notwithstanding work to rule practices and the overtime boycott. I have also taken into consideration, evidence of cooperation by both Local 702 and Local 148 in getting needed work performed, and the absence of evidence that either union directed or advised its members to engage in slowdowns. I also find significant, the absence of evidence of complaints from state authorities, customers, or the general public concerning the speed or quality of service during the period from April 24 to May 20; notwithstanding, that some of the Company's services must be provided within strict time limits. In light of these factors, I do not credit the testimony of Company supervisors concerning their alleged opinions or observations regarding a work slowdown, including testimony not specifically discussed herein. It follows that neither the Unions nor their members engaged in "partial" or intermittent" strikes through work slowdowns.

The evidence fails to show that Local 148 or its members engaged in any work-to-rule activity. Rather, Local 148-represented employees followed safety and work rules in the same manner as before April 24. The Company presented no evidence to show otherwise.

I further find that the Local 702 represented employees did not engage in any campaign of excessive or unreasonable work-to-rule practices. In this regard, I find particularly significant, the pertinent governmental and Company safety-and-work rules, the testimony of the Company's own safety supervisors, and the Company's own stated policies with regard to the rules. The evidence demonstrates particularly with respect to vehicles and other equipment, that proper inspection and checking was subject to a considerable degree, to operator discretion. After April 24, the employees were generally more diligent and systematic in following the rules. However, the safety supervisors were unable to fault the employees for doing so, even when they took more time in inspecting and checking equipment, asked numerous questions, or requested additional safety equipment. Moreover, the Company made clear that it expected the employees to adhere to safety and work rules, and that employees could be disciplined for failure to do so. Plainly, the employees did not unilaterally change established working conditions, by strictly adhering to the Company's own rules, and to governmental regulations. I further find that neither Union, nor their members, engaged in any calculated campaign of intentional carelessness or sabotage. In this regard, I find significant, as discussed, contradictions, and seeming inability of some Company witnesses to decide whether they were accusing the employees of overly strict adherence to safety and work rules, or of failure to adhere to such rules. I have also found significant, the admissions of company officials. Manager Baughman testified that he had no evidence that any identifiable persons engaged in sabotage.

As indicated, Grand Tower Superintendents Stamm and Simpson testified concerning what they characterized in sum, as unusual situations of defective operation of equipment. However, they testified in sum, that they were not accusing any one of sabotage or other deliberate misconduct, and had no reason to do so. With regard to the incident of low level of oxygen in boilers (indicated by black smoke), they testified in sum that this was evidently caused by operator inattention, although it could have been caused by other factors, and they had seen such problems before April 24. Stamm testified that the operator would know that a continuation of such operation could result in a fatal explosion. Plainly, the operator had no motivation to intentionally operate the controls in an improper manner. Stamm simply instructed the operator to correct the situation. Stamm and Simpson similarly testified with regard to other problems encountered after April 24. No testimony was presented concerning alleged improper operation or use of equipment by Local 702- represented employees at Grand Tower.

At this point, I shall take up the matter of the overtime boycotts. As found, no employee refused a direct order to work overtime. Beyond that, I shall deal respectively, with the divisions, Newton, and the Local 148 unit, as the situations differ significantly in each category.

In the divisions, there are two types of overtime. They are respectively: (1) "call out," sometime referred to as "emergency," and (2) "pre-scheduled," also known as "pre-arranged." In the second category, employees either remain past their regular shift, i.e., "holdover" overtime, or the overtime is arranged, or the employees are called in advance of the need. In call out situations, employees are called, usually at home outside of their regular working hours, when the need arises. Due to the nature of the Company's operations, there is a recurring need for callous overtime in some categories, particularly during or following storms.

Employees subject to call for overtime work are notified, based on lists of employees in pertinent categories. The manner in which overtime lists are compiled and order in which employees are called, will be discussed further in connection with the issue of overtime as mandatory or voluntarily.

Manager Baughman testified that overtime refusals during the period from April 24 to May 20, concerned mainly call out overtime. Eastern division Manager Herren testified that unit employees were not refusing prescheduled overtime. He testified that within a few days, few or no employees were accepting call out overtime, although a few employees took such overtime if personally requested by their supervisor (sometimes with restrictions, e.g., only in their immediate district.

Western division load dispatcher Robert Hubbard, testified as a General Counsel witness. Load dispatchers are unit employees. They make the calls for overtime callous, and are themselves subject to prescheduled overtime. Hubbard testified that he was asked to work, and did work, a total of some 40 to 50 hours of prescheduled overtime during the period from April 24 to May 20.

Southern division substation (Marion) engineer Rhodes, was the only witness to testify concerning refusals to perform prescheduled overtime. Rhodes testified that on one occasion, employees declined to take prescheduled overtime. He testified that he did not, on this or any occasion involving other (callous) overtime, order the employees to work overtime, because he felt he had no choice but to have a supervisor or supervisors do the work.

Former business representative Herb Miller was General Counsel's principal witness with respect to overtime practices. Miller testified that employees are required to remain for standby overtime, e.g., when the Company anticipates an emergency.

Western Division Manager Patterson testified as to two conversations with business representative Dan Miller regarding overtime refusals. The first concerned refusals in February 1993, which will be further discussed in the next section of this Decision. At that time, Miller told him that if the Company got to an employee before his regular quitting time, and the employee had no legitimate excuse for not going, the Company could properly dispatch the employee to an emergency job, even if the job would entail working beyond the quitting time. After April 24, few, and eventually no employees took call out overtime. When Patterson questioned Miller about this situation, asking what was going on, Miller simply responded that he had "no clue," and described the situation as an "incredible coincidence."

It is undisputed that beginning April 24, increasing numbers of division employees declined overtime, and that by May, nearly all (but not all) unit employees declined, were unavailable, or could not be reached, to take overtime calls. Although the Company was aware by April 21, of Local 702's plan for an overtime boycott, the Company continued to call off overtime lists, until it concluded that no unit employees were available for the overtime work. Manager Baughman testified that he gave instruction that dispatchers should make calls only in the immediate district, instead of following up with calls to nearby districts. Local 702 filed an unfair labor practice charge, alleging that the Company thereby improperly and unilaterally changed working conditions. The Board's Regional Office declined to proceed on the charge, but Local 702 continued to maintain this position.

However, the boycott campaign had its limits. Quincy Area Superintendent Ankrom testified that when warned about failure to respond to reported gas leaks within 1 hour, as required by the Illinois Commerce Commission, the employees took such calls.

It is also undisputed that as a consequence of the overtime boycott, supervisors, and in some cases, nonunit engineers, handled the overtime calls, in addition to performing their usual functions during their regular shifts. Ankrom testified they were able to cover the overtime, and to provide safe and reliable service, they did not complain that they were tired, their task was no harder than during the subsequent lock out, and that managers in other divisions indicated that they agreed with these assessments.

I find that during the period from April 24 to May 20, division employees engaged in union-instigated and concerted refusals to take callous overtime work, with exceptions and qualifications previously discussed. The employees engaged in such conduct in support of Local 702's bargaining position. In light of evidence discussed above, I find that there was no concerted refusal to perform prescheduled overtime work in the divisions.

The Newton power station includes six departments: stores, coal handling, mechanical maintenance, instrument, electrical, and operations. As in the divisions, there is both prescheduled and callout overtime.

Operations employees, and some maintenance employees, work on so-called "Dupont" shifts, which function on an around-the-clock basis. The Company is contractually obligated to fill vacancies on such shifts. It is undisputed that there were no overtime problems with respect to such positions during the period from April 24 to May 20. The Company conceded at the hearing that there were no overtime problems in operations, attributable to overtime boycott.

Manager Baughman testified that Newton employees refused to stay over for overtime. However, Plant Superintendent Kennedy testified that he did not know if there were any problems with prescheduled overtime. There were no scheduled or other outages at Newton during the period in question.

In the storeroom (stores department), overtime work substantially consists of calls to obtain parts. Storeroom employee and Local 702 steward Cynthia Root testified in sum as follows: every other day during the period in question, her supervisor, Kathy Patterson, asked her to remain after 3 p.m. (end of her shift) for overtime work. Each time, Root declined. And each time Patterson responded in joking fashion, that Root was "forced," but should not forget to say at 3 p.m. that she was going home sick. Root acted accordingly. When told forced, she said, "O.K." At 3 p.m., she would tell Patterson that she was not going to stay. Patterson would respond, "OK." Patterson did not order Root to remain, or tell Root that she was insubordinate. Root overheard Patterson engage in similar conversations with other storeroom employees.

Kathy Patterson was not called as a witness in this proceeding. Then Newton Supervisor Butler was the only company witness to testify concerning storeroom overtime procedure. Butler testified in sum as follows: There was sometimes storeroom overtime work. The shift supervisor would call employees. If no employee accepted, he would not "force" anyone. Rather, the supervisor would get the part. In light of Butler's testimony and the uncontradicted testimony of Root, I find that the Company regarded all storeroom overtime work as voluntary.

The principal questions with regard to overtime boycott at Newton, concern non-Dupont shift maintenance (including the instrument and electrical departments), and coal yard employees. The Newton overtime procedure differs significantly from that in the divisions. Prescheduled overtime requires 8 hours' advance notice. All other overtime is classified as call out. During the period in question, there was in place, by agreement between Local 702 and the Company, an arrangement whereby unit employees could place their name on a voluntary overtime list, pertinent to their respective

job qualifications or classification. Employees were called off the list, based on the principle of equalization of overtime, i.e., beginning with the employee or employees with least credited or recorded overtime. If the calls failed to obtain a sufficient number of employees, or no employees to take the overtime, then employees in the appropriate category (not limited to those on the voluntary list) could or would be "forced," in order of inverse seniority. Records clerk Greg Dennis, a nonsupervisory employee, was principally responsible for making the calls, including notice of "force," to maintenance employees. In the coal yard, Supervisor King gave "force" notice to employees.

In the next section of this decision, I shall discuss the Newton overtime procedure in greater detail. In particular, the parties dispute the meaning and significance of the "force" procedure. At this juncture, I am principally addressing the question of what actually happened during the period of April 24 to May 20.

Supervisors Butler and King testified with regard to the overtime situation in the coal yard. Butler testified in sum as follows: After April 24, he got no volunteers for overtime. When the "force" procedure was used, all of the employees gave excuses for not taking overtime. This was unprecedented. To his knowledge no employees were ordered to work overtime. None were disciplined. Supervisors performed the overtime work. Butler felt he had no alternative.

King testified in sum as follows: employees would agree to take voluntary overtime, and later say that they had other things to do. For example, Local 702 steward Jim Highland, a member of its negotiating committee, initially would accept voluntary overtime, and later say he could not work the overtime, giving frivolous excuses. On one occasion he said he had to get a hair cut. On another, he said he had an appointment to have sex with his wife. When employees were

told "forced," they gave excuses. The employees were not ordered to work overtime. As a consequence, supervisors performed the overtime work, which was substantial. The Company introduced records, showing that King worked 81 hours of overtime during the period from April 24 to May 18. King's testimony was also corroborated by his callout records.

Shift supervisor Ash testified that on one occasion, he called a maintenance electrician at home, for overtime work. Ash heard the employee tell the person answering the telephone to say that he was not home, which was done. However, Ash was calling for volunteers, and did not use the force procedure. Ash did not know who did the work.

Records clerk Dennis was the Company's principal witness regarding the overtime situation among maintenance personnel. Dennis' testimony was substantially corroborated by his callout records. His testimony, and the records, indicated the following pattern of behavior by unit employees: The number of acceptances by employees on the volunteer list dropped, until by the end of April, there were no acceptances. Dennis resorted to the force mode. Initially, employees took overtime when forced. But beginning about May 1, they began saying they were going home sick, or gave other excuses, e.g., picking up children. Employees who claimed to be sick remained until the end of their shift, although before April 24 they would immediately clock out. Dennis initially told those employees to inform their supervisor, fill out the sick leave form, and clock out, but was subsequently instructed to stop this practice. Some employees initially accepted when forced, but later called off, giving excuses. However, management instructed Dennis to continue using the force mode. Meanwhile, another evident tactic emerged. Increasing numbers of employees signed on to the volunteer lists, until all eligible employees were on the lists. This meant that Dennis had to make many more calls. However, when

Dennis made the calls, he got no volunteers. When his efforts were exhausted, supervisors, and Dennis himself, performed the overtime work. However, Dennis did not always go through the entire volunteer list, or resort to the force mode.

Dennis testified that employees who volunteer for overtime may later withdraw their acceptance. Newton lube man (mechanical maintenance department) Larry Waggoner, testified concerning a conversation with maintenance planner Donald Hudson, a nonsupervisory, nonunit employee who sometimes substituted for Dennis in making overtime calls. Waggoner testified that when he and other employees declined overtime, Hudson told him to accept the overtime, and then decline just before quitting time, adding "then I don't have to call anyone." Hudson, in his testimony, denied the alleged conversation.

By letter dated February 26, 1990, Manager Baughman informed Herb Miller that on two occasions at Newton, an employee accepted overtime, and then left without authorization and without completing the employee's work assignment. Baughman stated that this was misconduct. He asserted that in the past, the Company's position was not consistent, but that in the future, such conduct would be subject to discipline. He added that a notice to that effect would be posted on Newton bulletin boards.

Miller testified that he responded orally to Baughman's letter. He told Baughman that in view of Baughman's assertion that the Company would no longer abide by past practice, Local 702 would deal with the matter through the grievance procedure, if the Company sought to impose discipline. Local 702 stipulated on the record of the present proceeding, that it was not claming that the Company could not tell employees they were "forced or required" to work overtime. Rather, Local 702 counsel stated that Local 702's position was that the Company could not discipline employees for refusing overtime.

However, at another point, Herb Miller testified that Local 702's position was that if an employee agreed to work overtime and did not, the employee would be subject to discipline. He testified that for this reason, he declined to proceed with a 1979 grievance by an employee who was reprimanded for failure to work an overtime assignment, where the employee accepted and then refused the overtime.

Miller's testimony was contradictory, but Dennis' was not. I find, in light of Dennis' testimony, that employees who volunteer for overtime may later withdraw their acceptance. I credit Waggoner's testimony concerning his conversation with Hudson. The conversation is consistent with Cynthia Root's uncontroverted testimony concerning her similar conversation with supervisor Kathy Patterson. Moreover, Baughman's 1990 letter indicates that the Company was not objecting to the fact that the employees initially accepted, and then failed to work the overtime. Rather, Baughman's expressed concern was that the employees were not authorized to leave without performing the work. In the present situation (April 24 to May 20) the Newton employees who initially accepted the overtime, gave excuses for not remaining or reporting for the work, and their excuses, whether or not credible, were invariably accepted. Therefore, the employees were authorized to leave. In sum, whether or not by agreement with Local 702, Company policy was that as a general rule, employees who volunteered for overtime could subsequently withdraw their acceptance. Beyond that point, Newton practices regarding overtime will be discussed in the next section of this Decision dealing generally with the issue of mandatory versus voluntary overtime.

In the Local 148-represented unit, the term "canvass overtime," includes both scheduled and call out overtime. Scheduled overtime requires 8- hour advance notice. Other canvassed overtime is classified as call out, and usually involves emergency situations. A supervisor or other

designated person (in mechanical maintenance, the planning clerk) makes the calls (departments are similar, although not identical, with those at Newton). Calls are made from lists of eligible employees, based on the principal of equalization of overtime. Employees are called, in sequence, based on the least amount of overtime worked or refused. If the canvass fails to obtain an employee or sufficient number of employees, a force procedure may be used for Dupont maintenance shifts, and in operations (except at Hutsonville), where the Company is contractually required to fill vacancies. The force procedure is used on the basis of inverse seniority, beginning with the junior employee in the pertinent classification on the previous shift. Local 148 does not dispute that in such situations, "forced" overtime is mandatory There is no force procedure for regular maintenance shifts.

There is also a "blanket" overtime procedure, which is used for major outages. With reference to the period in question, the blanket overtime procedure is pertinent at Coffeen, where there was an ongoing maintenance outage. Under this procedure, all maintenance employees in the pertinent classifications are offered overtime, usually in the form of six 8-hour days (6-8's) or six 10-hour days (6-10's). Employees who wish to decline the overtime are instructed to so notify the Company. Historically, blanket overtime has been voluntary.

In contrast to the situation with Local 702, there is no dispute between Local 148 and the Company as to the distinction between mandatory and voluntary overtime, on an individual basis. Rather, as will be further discussed in the next section, the principal issue is whether Local 148 or the employees were privileged to engage in concerted or mass refusals to take voluntary overtime.

Vice president Dodd testified that nearly all Local 148 unit refusals to work overtime were at Coffeen. Manager Baughman testified in sum as follows: On May 23 (during the lock

out) he requested the plant superintendents of the four Local 148 represented facilities to inform him as to occasions during the period from April 24 through May 19, when nonunit personnel had to perform unit work because unit employees refused overtime. He received reports, and he evaluated the situation at each facility, as follows:

> *Grand Tower*: Supervisor Frye worked 19 hours doing Local 702 electrical work. To Baughman's knowledge, Local 148 employees performed overtime work when "compelled."
>
> *Meredosia*: There was no problem prior to May 12. Beginning May 12, employees said they would work overtime if forced. The superintendent decided that because of problems at other facilities, he would not use the force procedure. Supervisors performed 70 to 72 hours of unit work. There are not many opportunities for overtime work at Meredosia.
>
> *Hutsonville*: One employee initially declined, but subsequently worked overtime. On May 14, unit employees performed overtime work. On one occasion (May 13), a supervisor performed unit work. The report did not indicate the reason.
>
> *Coffeen*: There were considerable refusals to take overtime including orders to work overtime, but not on Dupont shifts. Most of the refusals related to the maintenance outage. No employees were disciplined for refusing overtime.

Instrument man Larry Ledermann, a General Counsel witness, was the only other witness to testify concerning Hutsonville. Ledermann testified in sum as follows: The employees decided to refuse canvass overtime until forced, but would not refuse an order. On May 13, Ledermann and another instrument man declined overtime. Supervisor Carl Inman told them: "I know this overtime refusal is part of the

game you guys are playing. If I decided this was an emergency, I could force you to stay, but I'm not going to do that." Inman said that if the employees declined to stay, he would do the work. Inman and an engineer performed the work. To Ledermann's knowledge, no Hutsonville employees were "forced" or ordered to work overtime during the period in question.

Grand Tower superintendents Stamm and Simpson testified, in sum, that although the Local 702 electricians declined overtime, the Local 148 employees refused only canvassed (voluntary) overtime, but took the overtime when "forced." No Meredosia personnel testified concerning the situation at that facility.

In sum, I find that Local 148 employees at Grand Tower, Meredosia and Hutsonville declined only canvassed voluntary overtime, the force procedure was used only at Grand Tower, the employees uniformly accepted forced overtime, and no employees were otherwise ordered to work overtime.

The Company presented testimony by four Coffeen supervisory personnel concerning the overtime situation at that facility. Senior mechanical maintenance supervisor Gillette testified in sum as follows: The Company offered blanket overtime for the outage (six 8's for most crafts, and six 10's for some electricians). Until April 24, acceptances averaged between 70 and 80 percent. Thereafter acceptances dropped to zero, and this situation continued until the lockout. As discussed, the Company resolved the problem by subcontracting, and supervisors performing overtime work.

Day shift mechanical maintenance supervisor Jurgena testified that after April 24, coverage for blanket overtime and regular maintenance shift overtime dried up, and there were no takers. Supervisors, including himself, worked on weekends.

Mechanical maintenance supervisor Riggs supervised Dupont shift crews. Riggs testified in sum as follows:

Beginning April 24, employees quit taking canvassed overtime. More often than before he had to use the force procedure. Also more often than before, employees were not at home, or he would get an answering machine, or employees would call in sick. Other than two employees who said they were sick, no employees declined forced overtime to fill a Dupont shift vacancy. Employees who are sick can (and should) leave work. He did not question the two employees, or order them to remain at work. To Rigg's knowledge, no employee refused an order to fill a Dupont shift vacancy. Riggs performed a lot of overtime work.

Senior electrical maintenance supervisor Ziglar corroborated the testimony of Gillette and Jurgena concerning the extent of the blanket overtime boycott. Zigler testified that he instructed the electrical maintenance supervisors to use the force procedure, although blanket overtime was historically voluntary, and that force procedure had never been used before for blanket overtime. He testified that some employees told him that they preferred that the Company use the force procedure.

General Counsel presented three witnesses who testified concerning the overtime situation at Coffeen: Chief steward Sweet, who worked in mechanical maintenance, maintenance electric an Robert Pachesa, and repairman James Beck (both present or former Local 148 functionaries). The three witnesses confirmed that by early May, no unit employees were taking blanket overtime or other nonmandatory overtime. Beck testified that where the Company was contractually obligated to fill vacancies, employees would refuse overtime until forced.

Beck testified that on several occasions after April 24, the planning clerk told him he was "forced" to do regular maintenance shift overtime. This had never been done before. Beck said he was going home. Sweet testified as to a similar

experience on one occasion. No supervisor ordered either employee to do the overtime, and neither was disciplined. Pachesa testified that when the electrical maintenance employees refused blanket overtime, his supervisor told him: "Don't forget, you're scheduled for 10 hours tomorrow." Pachesa had never been told anything like this before. He still declined the overtime. Later, the supervisor commented; "coming in tomorrow-no." Pachesa was never told he was forced, asked why he declined overtime, or disciplined for refusing overtime.

In sun, I find, that at Coffeen, employees declined only historically voluntary overtime, and accepted historically forced overtime except in a few cases where they gave proper excuses (sickness) which were not questioned. I further find that the employees in some cases declined "forced" overtime where such overtime was historically voluntary, but they were never ordered by a supervisor to perform such overtime work.

F. Was Overtime Mandatory or Voluntary in the Units, and if Mandatory, to What Extent?

1. Overtime in the divisions, and general considerations

As indicated, the present complaint refers to "non-mandatory overtime." General Counsel argues (Br. 11) that "the collective-bargaining agreements with Local 702 create no mandatory overtime." Local 702 argues (Br. 184) that overtime in the Divisions and Newton is voluntary. The Company asserts (Br. 181) that use of the phrase " 'nonmandatory' is irrelevant and misleading. The true issue is whether the Division employees' boycott of overtime was a unilateral change in the terms and conditions of their employment." However, even assuming that the Company correctly states the ultimate issue, that issue could not be resolved without first determining whether, and if so to what extent, overtime was mandatory.

Neither the Division or Newton contracts state, or historically stated, either that overtime was mandatory or voluntary. However, the Company relies on contract provisions as indicating, either individually or collectively, obligations to perform overtime work.

Chronologically, consideration of the overtime issue in the Divisions, begins with a 1949 arbitration decision. Local 702 grieved to arbitration, the Company's discharge of employee Kenneth Reed (in what is now, the southern division) for refusal to perform overtime callout work during an emergency. Arbitrator P. Kelliher held that Reed was not properly discharged. He concluded that an analysis of the pertinent contract provisions did not establish a mandatory requirement that the employee must report for work. Arbitrator Killiher determined that there was no agreement or understanding between Local 702 and the Company that would make reporting for emergency work a requirement, subject to disciplinary discharge.

The Reed arbitration was decided prior to the Steelworkers' Trilogy of cases, and specifically, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In deciding the Reed case, Arbitrator Kelliher held that he could not accept the Company's position by "in effect read(ing) into the contract a provision that does not exist from the clear working of the document," i.e., by taking shop practices into consideration. Under *Warrior & Gulf*, that is not a correct statement of the arbitrator's authority (363 U.S. at 581-582).

I have also taken into consideration that in subsequent arbitration proceedings against the Company, Local 702 never relied upon the Reed decision, nor did any arbitrator cite that decision as authority, although some subsequent grievance and arbitration proceedings at least arguably concerned the question of mandatory versus voluntary overtime. Herb Miller testified that he did not become aware of the Reed decision

until about 1985. These facts place into question the continuing viability of the Reed decision.

Nevertheless, I find that as of 1949, the Reed decision became part of the law of the shop, as an interpretation of the division contracts, and established a principle that callout overtime was voluntary. First, the Reed arbitration squarely addressed and decided the question of whether callout emergency overtime was mandatory or voluntary. Arbitrator Kelliher sustained the grievance, based on his determination that such overtime was voluntary. Second, the Reed decision stands as authority that the contract clauses, on their face, did not indicate that callout overtime was mandatory. Most of the principal clauses in the 1992 tentative agreement, related or arguably related to the issue, and on which the Company relies, were identical or similar to clauses in the 1948-1949 southern division contract involved in the Reed arbitration.

The Reed decision cannot be viewed as finally dispositive of the issue. Between the Reed decision and the events of the present case, stand 44 years of shop practices, discussions and negotiations between the parties, contract provisions and changes, arbitration decisions, and grievances resolved short of arbitration. This history must be taken into account. However, as indicted, the Reed decision established the principal that callout overtime was voluntary. Absent a showing to the contrary, it may properly be inferred that callous overtime remained voluntary through 1993.

In addition to taking into consideration, arbitration decisions discussing or interpreting contract provisions, I have also independently examined pertinent or alleged pertinent contract clauses. Before addressing such clauses, I shall at this point discuss two arbitration decisions to which the parties attach significance. They are respectively, the Cook and Burton decisions.

The Cook case was decided by Arbitrator Don Hopson in 1984. Journeyman Lineman Robert Cook (eastern division)

was given a 10-day suspension. The facts as found by Arbitrator Hopson were in sum as follows: There was a storm, and Cook was needed in his outlying area. Cook intentionally left his home phone off the hook. The Company then sent the local sheriff with a message. Nevertheless, Cook refused to report to work until his regularly scheduled time. He did not claim inability to work. Rather, he took the position that it was none of the Company's business what he did with his time after 5 p.m. and on weekends.

Cook was represented in the arbitration proceeding by Local 702 Business Representative Dave McNeeley. As indicated by the arbitrator's decision, and reflected in Local 702's brief, Local 702 took no position as to whether employees were required, or not required, to respond to overtime requests, including emergency requests. Rather, Local 702 asserted that although Cook showed poor judgment in failing to respond to the Company's message, the suspension was unfair, because the Company gave no prior warning of intent to enforce its rules.

Arbitrator Hopson upheld the discipline. Although Local 702 remained silent on the question of mandatory versus voluntary overtime, he proceeded to address the question. He noted that the Company cited many contract sections which impliedly required at least a reasonable amount of overtime, but could point to no provision imposing such requirement. Arbitrator Hopson held:

> Clearly, however, the past practices between the Company and the Union in this matter show that both sides have assumed that requireing a reasonable amount of overtime is within the power of the Company. Without deciding that issue specifically, it is clear, and surely the Union does not cntest in this case, that in an emergency situation, the Company has the right to call out an employee for work.

However, Arbitrator Hopson found that discipline was imposd for failure to answer the phone, apparently in order to avoid overtime assignments.

On its face, the arbitration decision purports to include a definitive finding that the Company can require employees to work overtime in an emergency situation. However, as Arbitrator Hopson recognized, Local 702 chose not to litigate that issue, nor did the Compnay impose dicipline because Cook refused to work overtime in an emergency situation. Rather, as stated by the Company in its formal disciplinary letter, Cook was given a 10-day suspension: "As a result of your failure to respond to the Company's request to contract the Effingham office to either accept the emergency overtime work or to notify the Compnay that you were unable to report for work." In sum, Cook could either have taken the overtime work, or notified the Company that he could not report for work. He did neither and consequently was disciplined.

Cook wassuspended because of insubordination, in that he deliberately refused to respond to a company message, received by him, to notify the Effingham office as to whether he was available to perform emergency overtime work. Local 702 did not dispute that he was insubordinate and chose not to litigate the question of whether he was required to perform the work. In these circumstances, Arbitrator Hopson's findings concerning mandatory vs. voluntary overtime were dicta, and not probative on the issue.[39]

The Burton arbitration presented a reverse situation from that of Cook. In the Burton case, Local 702 and the Company were primed to litigate the question of mandatory versus voluntary overtime, but the Arbitrator preferred to avoid that issue. The positions asserted by the parties warrant careful

---

[39] Herb Miller and Baughman each testified concerning settlement discussions in the Cook case. I am not persuaded that either verision is the more credible.

consideration, as the Burton case arose shortly before the events of the present case.

In early 1992, Effngham local utility Foreman Dennis Burton was given a 10-day suspension for not being available for overtime. Burton grieved the suspension, and Local 702 processed the grievance through arbitration. On March 15, 1993, Arbitrator James Westbrook issued his decision in the matter.

Burton was subject to the contractual residence requirement (Sec. 14) of the division contracts. The arbitrator found, and it is undisputed, that during the period form June 1 through December 31, 1991, Burton received 114 calls for overtime work. In 92 of these calls, the Company reached only a home answering machine. Burton accepted overtime for two calls.

Arbitrator Westbrook analyzed and decided the case in sum as follows: He "assume[d]" that the Company had a right to require a reasonable amount of overtime under "appropriate circumstances." However, he declined to delineate what that meant. He found that the residence requirement was designed to facilitate a quick response, that the Company had a longstanding policy against the use of devices, i.e., answering machines, to avoid overtime callouts, the policy was reasonable and consistently enforced, with violation as grounds for discipline. He did not accept the Company's argument that Section 7.05 of the contract (equalization of overtime clause) imposed an obligation on employees to be available for callouts enough to take an fair share of overtime assignments. The primary purpose of Section 7.05 was to protect the employees. Section 7.05 was one of several contract provisions which taken together, allowed the Company to require an employee to work overtime under "appropriate circumstances." The Company failed to prove that Burton inappropriately refused overtime. Rather, the Company proved difficulty in trying to contract Burton.

Burton violated the Company prohibition against use of an answering machine to make employees unavailable. Burton intentionally made himself unavailable for overtime calls. Therefore his suspension was reasonable. The grievance was denied.

When Division Manager Herren suspended Burton, he informed Burton that employees in his classification were required and expected to work overtime when necessary to respond to emergency calls. He asserted that Burton's record for the last 7 months of 1991 indicated that Burton was either not abiding by the contractual residence requirement, or deliberately avoiding calls with an answering machine; and that either way, Burton was not fulfilling his responsibilities. Therefore, Herren was giving Burton a suspension.

At the arbitration hearing, company counsel argued that the case involved Burton's failure to make himself available for a fair share of overtime trouble calls, and that Burton was told to take a fair share of calls. However, by letter dated October 20, 1992, Manager Baughman informed Local 702 counsel that to his knowledge, the Company had never before disciplined an employee for not being available for a reasonable amount of overtime.

In her brief to the arbitrator, Local 702 counsel argued that the Company disciplined Burton because of his single life style, which often took him away from home, sometimes overnight. She argued that the evidence showed the Company allows employees to exempt from emergency callouts unless no one was available. (In the Burton case, the overtime work was covered). Local 702 counsel further argued that the Company had not shown any policy requiring employees take overtime, or a reasonable amount of overtime. She similarly asserted Local 702's position in her opening argument to the arbitrator. Therefore, I do not agree with the Company's present assertion (Br. 193), that in the Burton case, Local 702

conceded that the Company could require employees to take overtime work, or a reasonable amount of overtime work.

In fact, the Company never had, nor prior to the Burton case did it announce or state, that it had a "fair share" policy regarding overtime work. Local 702 introduced in evidence in the Burton arbitration proceeding a comparison for the year 1991 of Burton and other eastern division local line foreman, indicating the percentage of their wages which included overtime pay. For Burton, overtime pay comprised 6.18 percent of his earnings. For six other local line foremen, overtime pay comprised a significantly lower proportion of their annual earnings, ranging from 0.57 percent to 4.03 percent. As will be further discussed, there were enormous disparities in the amount of overtime taken by similarly situated employees, including employees who took no overtime at all, or took overtime only at times or under conditions satisfactory to themselves.

In sum, the Burton case does not support the concept of mandatory overtime. The arbitrator's decision stands for the proposition that an employee subject of overtime calls may not use the device of an answering machine for the intentional purpose of avoiding such calls. The Arbitrator rejected the Company's "fair share" concept. Although he assumed that to some extent overtime was mandatory, he expressly avoided making any specific findings in this regard. Local 702 did not concede that overtime was in any way mandatory. Moreover, the facts of the case tend to indicate a general practice of voluntary overtime. Although Burton's acceptance of overtime was extremely low, the Company did not proceed to discipline him because of his low acceptance rate. Rather, the Company disciplined Burton because it believed he was either violating the residence requirement, or using an answering machine to avoid receiving calls.

As indicted, the Western division unit has been represented by Local 702 since about 1971. I have taken into

consideration, evidence concerning litigation related to Local 702's organizational campaign in that division.

Prior to union representation, Western division electric utilitymen were required to stand by at home, for the purpose of receiving overtime emergency calls. Such calls went directly from the customer to the employee, through the device of an "electronic secretary." The employees did not get standby pay.

In 1970, an unfair labor practice charge was filed, alleging, in sum, that the Company violated Section 8(a)(1) by discharging four employees who refused to take overtime calls through the electronic secretary procedure. A complaint issued, but the case was settled prior to hearing. However, in 1972, unit employees filed suit under the Fair Labor Standards Act, alleging that the Company unlawfully failed to pay standby overtime pay. The case was voluntarily dismissed upon stipulation that the Company would provide payments to certain named employees.

The standby requirement (without compensation) had been an issue in the representation election campaign. After Local 702 and the Company executed their first contract, employees were no longer required to standby to take calls, and the Company no longer used the direct call system. Instead, the dispatcher called employees from the overtime callout list. The changes applied to both gas and electric department employees.

I am not persuaded that the unfair labor practice case is in itself probative of the present issue. The nature of the alleged protected concerted activity is not clear from the record evidence in this case. However, what is significant, is the overtime lawsuit, and the changes in the overtime procedure. Prior to the lawsuit, the Company required employees to standby at home for overtime calls. When the Company realized that it thereby might be obligated to pay the

employees for such standby, it chose to abandon mandatory standby, and negotiated a different callout procedure with Local 702. The fact that the Company did so, and does not require employees, or any of them, to standby for callout overtime, tends to indicate the voluntary nature of such overtime.

At this point, I shall proceed to review relevant or arguably relevant provisions of the division contracts. Unless otherwise indicated, the provisions were included in the 1989-1992 contracts, and continued on by virtue of the 1992 tentative agreement.

Section 3.01 provides, in sum, that: the services performed by unit employees are essential; Local 702 will not call upon or permit employees or cease or refrain from continuous performance of their duties; the Company will not provoke such stoppages; and the parties will settle their differences in accordance with the contract. Section 3.02 provides, in sum, that if an employee or employees cease work, Local 702 will provide services without interruption or other injurious effect.

Sections 3.01 and 3.02 were included in the contracts at the time of the Reed arbitration case. The balance of article 3 establishes the contractual grievance and arbitration procedure. The entire article is captioned "negotiation and arbitration." It is evident that Sections 3.01 and 3.02 were the quid pro quo for grievance-arbitration.

In light of the Reed arbitration, it is evident that the arbitrator did not read Sections 3.01 and 3.02 as imposing an overtime obligation. Moreover, assuming that the sections imposed an obligation upon Local 702 or its members to refrain from an overtime boycott, that obligation expired as of April 24, when the contract extensions expired. The Company was not required under the Act, to arbitrate grievances which arose during the period when there was no contract in effect. The *Hilton-Davis Chemical Co.*, 285 NLRB 241, 242 (1970).

Therefore, there was no quid pro quo for Sections 3.01 and 3.02 and Local 702 had no obligation (assuming it ever did) to cover all overtime work.

Article 7 of the division contracts is the most important article concerning overtime. Insofar as the present issue is concerned, Section 7.05 is its most significant provision. Section 7.05 states that: "All overtime work shall be equally and impartially divided among all employees doing the same class of work insofar as is practicable."

It is evident that Section 7.05 was designed for the benefit of the employees, to afford them an equal opportunity to obtain overtime work. Arbitrator Westbrook expressly, and Arbitrator Kelliher impliedly so held. The Company had no evident interest in assuring equal and impartial distribution of overtime, thereby imposing an obligation upon itself, violations of which could subject the Company to liability. Therefore, the clause does not indicate that overtime was mandatory.

Other sections of article 7 use the words "required" or "called" in connection with hours of work. These or similar sections were included in the 1948-1949 southern division contract, and considered and rejected by arbitrator Kelliher as affording a basis for finding that callout overtime was mandatory. Section 7.06 provides the overtime rate for employees "required to continue at work beyond regular working hours." Section 7.10 provides the overtime rate for employees "required to work during their noon hour." However, neither provision, on its face, would apply to callout overtime. Section 7.13 provides that employees "shall not be required" to work on certain designated holidays, except in emergencies or as otherwise provided in the contract. However, that clause establishes those days set aside as holidays, i.e., days of rest, and does not expressly or impliedly deal with the question of overtime. Section 8.02 (under Working Rules and Conditions) provides that

"employees shall not be compelled to work under severe weather conditions unless on emergency exists." As found by Arbitrator Kelliher, this provision, like Section 7.13, is a "special situation" provision, which does not address the matter of overtime. This same is true of Section 7.11, which provides double pay for employees required to work at height of 175 feet or more on towers.

Unlike the words "required" or "compelled" the word "called," carries no implication of compulsion of any kind. Various sections of Article 7 establish pay rates for employees "called back to work," "called out," or "called to work" at or for times other than their regularly scheduled hours, including holidays. These provision neither expressly nor impliedly indicate that the employees are required to accept such calls. Some provisions e.g., Section 7.04 (general overtime rate), 7.12(b), referring, to employees who have worked for 16 hours or more, and Section 9.05, referring to employees who work into normal meal breaks, do not use such words as "required" or "compelled." In sum, the contract uses neutral language when referring to callout overtime, or to employees who work overtime.

Article 14 of the division contracts, as amended in the 1992 negotiations, imposes area residence requirements upon certain categories of employees who are subject to callout overtime. The article applies principally to line crews, utility linemen, and local gas men, together with certain other categories. However, the article grandfathers, i.e., exempts most journeymen already living beyond the mileage limit from their headquarters location.

The principal purpose of Article 14 is to enable enable employees to be available for, and to respond quickly to emergency calls. That need is reinforced by the Illinois Commerce Commission requirement that the Company monitor and report all gas leaks where the response time was more than 1 hour. In arbitration, the residence requirement

was held to be mandatory. There was no residency requirement in the 1948-1949 contract.

I am not persuaded that Article 14 evidences mandatory nature of overtime. Rather, the article and its application tend to show the opposite. By agreement between Local 702 and the Company, gas employees living beyond the mileage limit for their headquarters location are not placed on the overtime callout list. Rather, after calls are placed to all employees on the list at the district location, the closest available person is called. However, employees living outside the mileage limit are used for prescheduled overtime. In sum, employees living beyond the mileage limit are penalized by denial of the opportunity, i.e., privilege, of obtaining callous overtime work.

Moreover, the residence requirement does not apply to all employees subject to overtime callout. Aprentices and (as indicated) some journeymen are exempted. So also are meter readers, forestry department employees, and others.

The Company's practice with respect to taking home company vehicles, also fails to evidence that callout overtime is mandatory. As indicated, some categories of employees subject to callout overtime are privileged, but not required, to take company vehicles home with them. The privilege does not extend to large line trucks and some line clearance trucks. More significantly, the privilege extends to some employees who are not normally subject to emergency callout. In 1984, the Company sought to withdraw the privilege from meter readers and relay journeymen, on the ground that such employees were not needed to respond to emergencies unless there was a big storm. A grievance over the matter was resolved by "grandfathering"the practice for employees who currently enjoyed the "privilege." In sum, as conceded by substation maintenance engineer Baker, the determination of who took trucks home, was not related to who got the most overtime calls. Rather, as testified by substation electrician

Martin Lee, the practice was perceived as a benefit both to the Company and the employees.

I also find significant, the fact that employees, including those subject to emergency callout, are not required to have home telephones. In sum, the evidence with respect to residence requirements, the privilege of taking home company vehicles, and the absence of any telephone requirement, tends to indicate the voluntary nature of callout overtime.

Roger Nelson, a recently hired lineman, testified that when he was interviewed, Operations Supervisor Reynolds told him that overtime was not mandatory, but he was expected to work it if hired. Reynolds testified that he told applicants that overtime was part of their job, and the Company required employees to take overtime. He testified that when he was hired as an electrical lineman in 1976, he was told that he was expected to take overtime calls. However, Area Superintendent Willis testified that he did not think that in job interviews, applicants were told that overtime was mandatory. Gas Department Manager Jim Davis testified that as a superintendent in various locations, he told job applicants that overtime would be part of their job, but did not tell them that they couldn't refuse overtime.

The Company standard employment application form states that a number of jobs require employees to work extended hours and be available for work on short notice, particularly during bad weather. Applicants were asked whether there was anything to prevent them from working on a job of this nature. However, the form also states that that employment is at will, and may be terminated at will at any time, with or without cause. However, under the Company's collective-bargaining contracts, discharge is subject to the grievance-arbitration procedure. The Unions do not represent job applicants. It is evident that the application form has no significance with respect to the rights or obligations of unit employees.

In light of the testimony of Willis and Davis, I credit Nelson. I find that the Company did not tell applicants that overtime was mandatory. Applicants were told that overtime was part of their job. However, this begs the question. Overtime was part of employees' work. The contracts contain numerous provisions governing overtime. However, it does not follow from these facts, that the unit employees had either an individual or collective obligation to perform overtime work.

Statements and positions taken, or not taken by Local 702 and the Company over the years, further tend to indicate the voluntary nature of callout overtime. Herb Miller testified in sum as follows: At union meetings, both in the divisions and Newton, he urged employees to take overtime work, because if they did not, supervisors and contractors would get the work. He may have said that it was important to take the work if no one was available. He explained that overtime was part of their job. He did not tell employees that overtime was their job or that they had to do it. About 1985, he told Western division employees that "if your wife says you're not home, you better not be home," because if the Company found out, there could be disciplinary action which would be tough to defend. Miller told Western Division Manager Patterson that if Patterson couldn't get employees for emergency overtime, he should tell Miller. Miller would try to correct the situation. Miller did not say that he would take the employees to the woodshed.

In sum, Miller tried to persuade employees to take overtime, in order to preserve their opportunities for such work, and prevent overtime work from being lost to the unit employees, through supervisors and contractors doing such work. He cautioned employees not to deliberately avoid receiving phone calls. However, he never told employees that they had to take overtime work. Miller's testimony was expressly or inferentially corroborated by company witnesses,

and by the Company's own position statement in this proceeding. District Superintendent Terry Coker testified that in the 1980's, when he was a western division unit employee, Miller tried to pressure employees to take overtime work, explaining that if they did not, the Company would get someone else to do it. Coker initially testified that Miller said the employees were obligated to take overtime, but subsequently admitted that Miller never said the contract required them to do so. Area Operations Supervisor Dennis Swan was an eastern division employee, and Local 702 steward from 1979 to 1989. Swan testified that Miller said the employees were expected to take overtime, but did not say they were required to do so. Swan admitted that Miller expressed concern that if the employees did not cover the work, the Company would subcontract such work. District Superintendent Gary Dennis testified that as a western division employee, he was never told that overtime was mandatory. However, he was subject to "peer pressure," because employees wanted and fought over overtime.

In its position statement to the Board's Regional Office, the Company quoted Miller as allegedly saying that if the employees did not take callout overtime, the Company would get someone else who would, and expressed fear that the Company would resort to subcontracting or a night shift. The Company quoted business representative Craddock as allegedly saying that if the employees did not take overtime, then the work would be a negotiated item, and the employees would be waiting for phone calls, or put on a Tuesday through Saturday shift, with less overtime. Miller and Craddock were both quoted as saying they did not want the work going to someone else.

In light of the foregoing admissions, I credit Miller, I find that neither Miller nor any other responsible Local 702 official, ever said or implied that callout overtime was mandatory in the divisions. Rather, they sought to persuade

employees to take overtime as much as possible, in order that employees who wanted overtime work would not be deprived of such opportunities, through subcontracting, use of supervisors, of Company resort to shift changes.

Additional evidence tends to indicate that both the Company and Local 702 regarded overtime as an employee privilege rather than obligation. Callout overtime lists have historically been captioned and referred to as overtime "privilege" lists. In a 1971 memo, the Company referred to the callout procedure as the "privilege schedule."

The Company never published or otherwise formally announced any rule stating either that overtime was mandatory, or that employees could be disciplined for not taking overtime. Nor did the Company ever announce any rule that employees were expected to take their "fair share" of overtime. This, notwithstanding that the Company has from time to time published and posted work rules covering a wide variety of matters, including overtime callout procedure. Company witnesses Wesslund and Swan testified, in sum, that they were never told that overtime was mandatory, or they could not refuse overtime, or could be disciplined for refusing overtime. Area Operations Supervisor Reynolds testified that in April 1994 (i.e., long after the lockout), he said overtime was mandatory and that he did so in response to a letter from Manager Baughman, and because of new problems.

Among company witnesses who sought to show that overtime was mandatory, there was considerable confusion as to what "mandatory" meant. Area Operations Supervisors McElroy and Reynolds testified in sum, that mandatory meant that employees should have a good reason for refusing overtime. Area Superintendent Willis testified that employeeswere obligated to their fellow employees to take their "fair share" of overtime. Western Division Manager Patterson testified that until 1985, he believed that employees

were obligated to take their fair share of overtime, but thereafter, his policy was that it made no difference who did the work, so long as someone took it, and employees were not complaining. As indicated, when Business Representative Roan asked Manager Baughman whether overtime was mandatory, Baughman responded that "its your work," and someone had to do it.

The manner in which overtime lists are compiled and administered, and to some extent, the order in which employees are called, indicates that these procedures were designed primarily for the benefit of the employees rather than the Company. Indeed, the very lack of uniformity in these procedures, tends to so suggest. Typically, overtime lists are maintained by a foreman, who is a unit employee. A dispatcher, who is also a unit employee, makes the calls. The manner in which overtime lists are compiled variously includes such standards as a system chosen by the employees, overtime equalization principles, seniority, and annual random drawing. Such criteria plainly would be of no interest to the Company, beyond assuring employee satisfaction. Employees could, and did, have their names taken off both prescheduled and callout overtime lists. In sum, these facts tend to indicate the voluntary nature of overtime.

In fact, as indicated, there have historically been great differences in the amount of overtime taken by similarly situated employees. Employees have refused to take overtime, sometimes for long periods of times, giving reasons which were arbitrary of frivolous, or sometimes giving no reason at all. They have done so with Company acquiescence.

Typically, younger employees, eager to earn maximum potential earnings, have more readily sought and accepted overtime work. Older employees, more concerned with enjoying their leisure time, have been less likely to take overtime. However, neither pattern has been consistent.

The case of Western Division utility lineman J.C. Barnard is illustrative. Barnard had a long history not simply of not accepting overtime, but also of avoiding overtime calls. His failure to take overtime was the subject of a 1984 company memo. Five years later, Area Operations Supervisor Reynolds noted that Barnard's callout record showed "no intention of taking any overtime callouts, if possible." Nevertheless, the Company took no disciplinary action. In 1989, Barnard bid for another job, for which he had seniority. The Company initially declined to award him the job, because of his poor record on overtime. Herb Miller argued that his overtime record was not a pertinent factor, and referred to the Reed arbitration. Miller explained that Barnard was a single parent of a teenage child, but that in the future, he would take overtime work. The Company awarded the job to Bernard. Thereafter, he took most, but not all of his overtime calls. In sum, notwithstanding many years of persistent refusal and avoidance of overtime, the Company rewarded, rather than disciplined Bernard.

Western Division line crew Foreman Jim Bell was another employee who regularly refused to take callout overtime. Bell evidently avoided overtime calls through use of an answering machine, or having his wife say he was not home at times (e.g., 3 a.m.), when this was unlikely. Western Division Manager Patterson asked Herb Miller to speak to him. Bell explained to Dan Miller that he believed the Company was discriminating in favor of another foreman in assignment of jobs, and he was displaying his anger by not taking overtime. The Company resolved the problem by combining crews, with Bell still in charge of a crew.

In late 1982, Division Manager Patterson complained to Dan Miller that area Superintendent Ankrom reported to him that when Ankrom asked Quincy lineman Dale Alcorn why Alcorn refused overtime, Alcorn responded that he didn't have to give a reason, and hung up. Patterson said that Alcorn

was rude. Miller agreed that Alcorn should have been courteous. Patterson did not say that Alcorn had to give a reason. The Bell and Alcorn matters are also significant, in that Patterson did not resort to discipline. Rather, Patterson appealed to the Local 702 officials, knowing that they could only use persuasion. Patterson testified that whenever he discussed such problems with Herb Miller (referring to the Barnard and Bell matters) Miller would say that he would try to get the employees to take overtime.

Barnard and Bell were not the only employees subject to callout overtime who regularly refused or avoided such work.

Robert Hubbard has been for many years chief load dispatcher at Beardstown in the western division. In that capacity, he had been principally involved in the callout overtime procedure. Hubbard testified in sum as follows: employees frequently decline overtime, but only sometimes give reasons. When they decline, the dispatcher simply goes the next name. At times, such as holidays, the December holiday season, and summer, it is sometimes difficult to get employees to take overtime. To his knowledge, no employee has been ordered to take overtime, or disciplined for refusing overtime.

Western division meterman and fomer gas utilityman William Braden testified in sum as follows: As gas utilityman he sometimes declined callout overtime, by simply saying he was not available. For nearly a year, in the early 1980's he regularly declined overtime because he was "perturbed" at the situation at the Havana facility. He was never warned or disciplined.

Southern division gas utilityman Frank Mondino testified that he and utilityman Peebles regularly declined overtime in the fall, because they preferred to go hunting or do yard work. He testified that on one occasion, Supervisor Ted Rose responded that it was okay, when they declined overtime, but added that one day they would get their asses in a bind.

Mondino's testimony concerning his alleged overall pattern of overtime refusals was contradicted by his investigatory affidavit. His affidavit indicated that overall, Mondino took what might be characterized as his "fair share" of overtime. However, the testimony of Supervisor Rose tended to indicate the voluntary nature of callout overtime. Rose confirmed that beginning in 1987, Mondino, Peebles, and a third employee (Yearack) regularly refused overtime in the fall, because they preferred to go hunting. Rose denied that he told them they would they would get their asses in a bind, in effect conceding that he tolerated their refusals. Rose testified that notwithstanding their refusals, he was able to make up two three-man crews to perform the needed work. However, he admitted that it was "very possible" that when Mondino and Yearack refused overtime, he could make up only one crew, although two were needed.

Rose testified that in the fall, he was able to get overtime work done, because he was always able to make up a crew. However, Marion (southern division) Substation electrician Martin Lee testified that during the hunting season, when it was difficult to get qualified employees for overtime, the Company would simply postpone the work. If there was an emergency, the Company would train available employees to do the work. On a few other occasions, the Company postponed callout or prescheduled overtime work when it could not get employees to perform the work. No one was warned or disciplined. (As steward, Lee would know if such action were taken).

Lee testified concerning substation employees who regularly declined overtime: Bob Blue, Jim Cagle, Mike Gamble, and Stanley Garten. All were subject to the residency requirement. Blue suffered from arthritis, but occasionally took overtime. However, the other employees had no physical disability or other evident objective basis for routinely declining overtime. Substation Engineer Rhodes, the

Company's principal witness with regard to these matters, confirmed Lee's testimony in significant respects.

Lee testified that Cagle would not work overtime unless the Company was shorthanded, did not want to be bothered, and the dispatcher stopped calling him. Cagle's name was taken off both the prescheduled and callout overtime lists for about 12 years. Rhodes testified that Cagle typically worked only overtime when many employees were on vacation, and preferred not to work overtime. Rhodes did not know whether any employee's name was removed from the overtime lists, because steward Lee had the list and pertinent information.

Lee testified that Gamble said he didn't want to work overtime. His name was taken off the prescheduled overtime list for about 6 years. He worked callout overtime about 25 to 30 percent of the times he was called, but now takes over half of his calls. He will work prescheduled overtime if needed. Rhodes testified that Gamble preferred to participate in fishing tourments, and took very little overtime. Lee testified that Garten did not want callout overtime. His name was taken off both the prescheduled and callout overtime lists for about 6 years. He usually declined overtime, unless needed to fill out a crew. In 1991, he was promoted to foreman, and since then has usually taken overtime. Rhodes testified that he preferred not to take overtime, but since becoming assistant foreman, has taken his share of overtime. In sum, notwithstanding Garten's unwillingness to take overtime, the Company gave him a promotion. Rhodes admitted that it was possible that overtime was canceled because Lee could not get enough employees.

Pana (eastern division) area Operations Supervisor Swan, as a Company witness, testified concerning employees who habitually declined overtime. Swan testified that over a 6-week period in 1991, employee Jim Fray got 25 overtime calls, but took none, that employee Carroll rarely took overtime calls, and other employees refused much overtime.

None were disciplined. Marion (southern division) gas construction Supervisor Grogan testified that journeyman Charlie Beding always arranged for others to take his overtime calls, and told the answering service not to call him.

Herb Miller testified as to company complaints about several other employees who habitually refused overtime. Among these, Guy Barnes would work only indoors. Richard Tuttle had another job, as did Terry Wright. When the Company complained to Miller that Wright was not available for overtime, Wright responded that it was none of the Company's business and the Company should get off his back. Don Hill refused overtime during a 4-year period, giving false reasons for his refusals. Gerald Coker refused overtime out of spite, because the Company found him in a barber shop while on company time. Miller told him to forget it, but Coker continued to refuse overtime. Tuttle and Bud Thomas, like Stanley Garten, were promoted to foreman, notwithstanding their records of overtime refusals. Dan Miller testified as to several employees whose names were taken off the callout list. The Company took no action against any of the employees.

Southern division electric operations Supervisor Neuman testified in sum as follows: In the early 1970's a dispatcher called Benton foreman Floyd Walker for overtime. Walker responded that he did not have appropriate warm clothing. The dispatcher was unable to get anyone else in the district. Neuman told Walker that his excuse was unacceptable, and he would consider a verbal reprimand. Other than this incident, Walker had a good record on overtime. Neuman did not notify Local 702 of the incident.

Neuman further testified in sum as follows: In October 1992, two lineman (Majors and Brewer) balked at taking Saturday prescheduled overtime. Neuman told Brewer that he had to have a good reason. Brewer responded that he just didn't want to work overtime, and was going fishing. Neuman

told him told him therefore, he should not report on Monday. Brewer said he quit, and did. The Company's records indicate that Majors resigned on September 29, 1992, because he was accepting another position, and that Brewer resigned on October 2, 1992 (no reason indicated).

In light of other evidence discussed above, I attached no significance to incidents as described by Neuman. As Neuman did not follow through with any discipline against Walker, and Local 702 was not informed of the matter, Local 702 had no opportunity to respond in the matter. The matter of Majors and Brewer involved prescheduled overtime. Moreover, as both employees quit, Local 702 had no occasion to respond. Indeed, there is a total lack of evidence that the Company ever successfully administered formal discipline against a division employee for refusing callout overtime.[40]

Company records confirm that employees subject to overtime call, arbitrarily and sometimes routinely refused overtime in accordance with their own whims. The Company compiled and presented in evidence a record of employees' responses to overtime callouts in the western division over a 2-year period, from April 1991 until the lockout. For employee Wetzel, the record showed such responses as "wife's answer not fit for log," "tired," "Don't feel like it," "helping neighbor," "cutting grass," and "baby sitting." The records also indicate that employee Osmeyer seldom accepted overtime calls in winter.

The Company also presented in evidence, eastern division callout records for the period from June 1 through December

---

[40] The 1986 grievance proceeding involving Grand Tower electrician Rick Will, is not probative on the question of mandatory versus voluntary overtime. Will was given a suspension for unexcused absence and insubsordination, in that he took vacation time unilaterally, notwithstanding a Company directive cancelling electricians' vacations for the month, by reason of a heavy volume of work. Local 702 and the Company agreed that the suspension would be on a nonprecedent basis.

31, 1991 (the records had been introduced in evidence in the Burton arbitration). The records for the Paxton area indicated a enormous disparity in the number of overtime calls to electric operations foremen. Two of seven foreman received most of the calls. The records ranged from foremen Hull, who took 26 to 33 calls, to foreman Weisenbarn, who got 1 call, which he did not take. The Company offered explanations as to some of the disparity. However, the explanation with regard to Weisenbarn, tended to evidence the voluntary nature of overtime. Supervisor Wesslund, who was then one of the foreman, testified that Weisenbarn always put his name on the bottom of the rotating callout list, and never rotated to the top. Division Manager Herren testified that before he arrived in the division, gas and electric utility foremen were permitted to put themselves at the bottom of the callout list, but that he discontinued the practice, except in the Albion subdistrict. However, Herren took charge in the division on July 1, 1990. As indicated, Weisenbarn continued to engage in this practice long after that date. Herren testified that other foreman also placed themselves at the bottom of the callout list.

In sum, the evidence indicates that in the divisions, at least on an individual, person by person basis, overtime is voluntary. The voluntary nature of such overtime is demonstrated by the Reed arbitration, the absence of any subsequent arbitration decision definitively establishing that such overtime is mandatory, the absence of contract clauses indicating expressly or impliedly, that such overtime is mandatory, the positions taken by Local 702 and the Company over the years, the manner in which they resolved grievances and complaints, and long-followed and established practices with regard to callout overtime. As the unit employees did not, during the period from April 24 to May 20, engage in any concerted refusal to perform prescheduled overtime, it is not necessary, for purposes of this decision to make a definitive finding as to whether such overtime is mandatory or voluntary.

There remains the question of whether Local 702 and the division employees have a collective obligation to perform callout overtime work. In sum, the question presented is whether, as asserted by Manager Baughman, such overtime was Local 702's work, and had to be performed by someone or some people in the units.

In this regard, the history of relations between Local 702 and the Company with respect to concerted refusals to perform overtime work, is significant. That history indicates that the Company has long tolerated and accommodated itself to concerted refusals to perform overtime work, whether or not such boycotts were initiated by Local 702.

As indicated, in July 1976, Local 702 engaged in a strike against the Company in support of its contract demands. Prior to striking, Local 702 sought to apply pressure (as it did in 1993) by engaging in an overtime boycott. Supervisors performed overtime work. No employees were disciplined for refusing overtime.

During the late 1970's and 1980's, there were several instances in which unit employees engaged in concerted refusals to work overtime, by reason of perceived grievances.

In 1976, Western division employees boycotted weekend overtime in protest of an adverse arbitration decision. The Company used supervisors and an apprentice to perform the work. The boycott ended when Herb Miller told the employees to abide by the decision. There was no discipline.

On a subsequent occasion, Efffingham (eastern division) employees engaged in an overtime boycott, to express their dissatisfaction with a new supervisor. The boycott lasted about 1 month. The Company used employees from other districts to handle the overtime. Eventually, the supervisor was reassigned to another district, where the same problem occurred. Again, the dispatcher handled the matter by obtaining employees from other areas.

In or about 1982, Paris (eastern division) employees refused to take overtime, because the position of gas utility foreman had been awarded to an employee from outside their group. Again, the Company handled the matter by calling employees from other districts. The dispute was eventually resolved. However, despite urging from Herb Miller, intermittent refusals continued until the mid-1980's.

In late 1988 and early 1989, Charleston and Pena (eastern division) employees were refusing to take overtime. The Company proposed to change the work rules, to enable the Company to call individuals first for overtime, before calling an entire crew. Herb Miller told the Company that the problem was employee dissatisfaction with the area supervisor. In their discussions, Division Manager Herren noted that in the preceding year, the Company had to go out of district 32 times in order to obtain an employee to take local callout overtime. The Company did not claim that it could force the local employees to take the overtime.

Don Miller (not to be confused with Dan Miller) was southern division manager prior to Bruce Fritz. During Miller's tenure, Business Manager Joe Craddock called a weekend overtime boycott because he was unable to get Manager Miller to discuss accumulated grievances. The division employees declined overtime for that weekend. There was no discipline.

In 1989 (about the same period as the southern division boycott) employees of the Asplundh company were engaged in a strike. The employees were repesented by Local 702, and Asplundh was a company contractor. When Anna (southern division) employees learned that Asplundh was using supervisory nonunion personnel to perform tree-trimming work for the Company, they engaged in a concerted refusal to perform overtime work. The boycott extended throughout the Southern Division, and among some Eastern Division employees. The boycott lasted about 5 days, until the

nonunion Asplundh personnel left. Again, there was no discipline for the overtime refusals, although one employee was suspended for "harassment." Supervisors performed the overtime work as needed. Southern Division electrical operation Supervisor William Neuman testified that they did so because if employees do not perform overtime work, the Company's only choice is to use supervisors.

Area Superintendent Ankrom testified that on one occasion, employees parked their trucks, i.e., refused to take them home for ready use in overtime calls, because of a rumor that they would have to pay income tax on the personal use of the trucks. As with overtime boycotts, there was no discipline.

The most recent instance of an overtime boycott, prior to the period of April 24 to May 20, occurred in February 1993. In the Western Division for periods of 1 to 3 weeks, employees engaged in refusals to work overtime, and work to rule practices. The motive was the same as the later inside game strategy, i.e., to support Local 702's contract demands. The Company was well aware, from distribution of literature and employees' remarks, of the concerted nature of the activity, and the reason for the activity. Nevertheless, the Company did not discipline or warn the employees. Instead, the Company met its needs by postponing overtime work, possibly shortcutting the callout procedure, and to a minor extent, using supervisory personnel. Business Representative Miller suggested that the Company could hold over employees until it determined how many were needed. However, the Company did not utilize this procedure.

The post-April 24 overtime boycott was greater in scope, duration, and intensity than prior boycotts. Consequently, the Company made greater use of nonunion personnel to perform overtime work, than it had in prior situations. However, this was a difference without a distinction. The Company, by its prior course of action, impliedly conceded that employees

could engage, not simply in individual refusals to work overtime, but also in concerted refusals, even to the extent that non-unit personnel would have to perform the overtime work. Therefore, the unit employees did not unilaterally change the terms and conditions of their employment, simply by engaging in an overtime boycott which was more extensive than prior such actions.

The evidence fails to indicate that during the period from April 24 to May 20 unit employees engaged in any concerted campaign to intentionally avoid overtime calls through use of answering machines or false statements by family members that the employee was not at home; or that individual employees did so to any greater extent than before April 24. Even if they did so, such conduct would be immaterial to a determination as to whether the employees were privileged to engage in an overtime boycott. As the employees were engaged in such boycott, it made no practical difference, whether they refused overtime by saying no, or by failing to answer calls. Moreover, the evidence indicates that restrictions on use of devices to receive overtime calls, do not indicate that the overtime was mandatory. As testified by Steward Lee, employees who turned down overtime were charged as if they had performed the work. Therefore, by intentionally using an answering machine, an employees could avoid that penalty. The restrictions also served an important purpose, in that they were a device to encourage employees to take the overtime. It was easier for an employee to simply avoid answering a call, rather than be placed in a position of saying no to a fellow employee. That factor is particularly evident with respect to the Newton unit, which will next be discussed.

2. Overtime in the Newton Unit

The overtime procedure at Newton has been a subject of controversy, negotiation and renegotiation between Local 702 and the Company since they negotiated their first unit contract

in 1978. As indicated, there is in effect a "force" procedure at Newton.

The 1989-1992 Newton contract included the following provision pertaining to overtime (Section 7.01(b)):

> All overtime work in any classification shall be divided equally and impartially among the employees in that classification. Overtime records shall be kept up-to-date by the Company and shall be posted weekly reflecting all accumulated overtime to date during the calendar year. Employees who decline to work overtime shall be charged with the time refused as if they had worked the overtime involved.

The above clause has been included since the first contract, except that in 1980, the clause was amended to provide for weekly rather than daily posting.

Section 7.01(d) of the contract provides a procedure to be followed: "In the event the vacancy cannot be filled by qualified employees within the classification." The procedure, as amended in 1980, has been included in the contract since that time. The procedure provides in sum, for shift changes, canvassing by low overtime, and as a last resort that "an employee in the classification where the original vacancy occurred will provide the overtime." Although Article 7 does not define the term "the vacancy," it is evident in context, including the exception provision of Section 7.01(d)(4), that Section 7.01(d) pertains to situations where the Company is contractually obligated to fill vacancies.

Since 1982, the contract has contained the following clause (Section 706(a)):

> No overtime will be offered to the employee who reports off duty for sick leave, family hospitalization, death in family, jury duty, or vacation from the time of reporting off or from the close of the last scheduled shift

worked up until the completion of his first regular shift following the absence. Except that an employee who takes a single day vacation will not be offered overtime for the day of the vacation only. But if offered overtime prior to next scheduled shift, that person shall not be forced to work the overtime, (emphasis added).

This was the first contractual reference to any force procedure. However, on July 28, 1982, Local 702 and the Company executed a side agreement which was incorporated into the contract. The agreement provides as follows:

Whenever employees are needed on an overtime basis, the number in each classification will be determined and the employees in the classification will be canvassed by low overtime order, and if the number required is not obtained on a voluntary basis, then one of the following procedures will be used:

A. If overtime is required following a regular schedule of work or on the weekend, the remaining positions will be filled by requiring the low seniority Journeyman or apprentice in the classification to work.

B. If overtime is required for the following day, the number will be as follows:

1. If one-half or more of the number required volunteers for overtime, the remaining positions will be filled by requiring the low seniority journeyman or apprentice in the classification to work.

2. If less than one-half of the number required volunteers for overtime, the entire number required will be scheduled at straight time in accordance with the last paragraph of Section 5.03. Those scheduled will be the low seniority journeyman or apprentice in the classification.

> When requiring the low seniority man to work, an employee who has worked 16 hours will not be considered. Apprentices will be utilized on overtime on the previously agreed to ratio.

The agreement indicated that it was a clarification of Section 5.03 of the contract, which deals with change of shift or schedule. The reference to "last paragraph of Section 5.03," evidently referred to what later become Section 5.03(c), which provides that in the event the employees fail to report to emergency work of less than 5 days on an overtime basis, then schedule changes will be made at no penalty to the Company, i.e., on a straight time basis. A marginal notation indicates that the side agreement was "moved to 7.02 A + B." i.e., the overtime provisions.

As part of their 1992 tentative agreement, Local 702 and the Company agreed to amend Section 7.01(b) of the contract to read as follows:

> Overtime will be called from a rotating list of all employees in a classification in accordance with the Side Agreement dated July 1, 1992, concerning volunteer and forced overtime. Overtime records shall be posted daily, except Saturdays, Sundays and holidays. Overtime will be called from the eligible employees starting at the top of the rotating list. Employees who accept, refuse or who are unavailable for any reason, will have their name placed at the bottom of the rotating list. If it is necessary to force an employee to work overtime, the employee or employees forced will be forced in order of reverse classification seniority. An employee will not be forced to work more than twice a week, unless the Company has exhausted the eligible employees in the classification and must start over. When calling for overtime, the Company will let the telephone ring a minimum of seven (7) times before proceeding to the next name on the list.

The present record does not contain any pertinent side agreement dated July 1, 1992.

The 1989-1992 contract, as carried over by the 1992 tentative agreement, contains other references to "required" work in connection with overtime. Section 7.03 provides that employees required to continue at work beyond regular working hours shall be paid at the prevailing overtime rate for actual excess time. Section 7.05 provides in sum that employees called out for emergency work are required to complete any additional emergency work that develops while they are at the station, but are not otherwise required to remain.

The contract also contains a side agreement, dated July 28, 1989, which provides in pertinent part as follows:

> 2. An employee who declines to work overtime shall be charged with the time refused as if he has worked the overtime involved, unless his line is busy when the Company attempts to call him, or unless there is no answer at his residence.
>
> 3. When an employee is forced to work overtime, the employee will not be charged the hours he works on the overtime list.

As indicated, the principal question now presented, concerns the meaning of the force procedure, and the use of the terms "forced" and "required" in connection with that procedure. For the reasons now discussed, I find that employees are not literally required to work overtime under the force procedure, except where the Company is con-tractually required to fill vacancies. Rather, the force pro-cedure is a device to pressure employees into taking over-time. When employees are called on a voluntary basis, they need not give any reason for refusing overtime. If a suf-ficient number of employees are not obtained on a voluntary basis, and the force procedure is used, the employees must give a reason for

declining overtime. That reason must be accepted, regardless of the nature of the reason, or whether the reason is credible.

The analysis begins with two grievances, one of which resulted in an arbitration decision, and the second, which was resolve short of arbitration. They involved, respectively, employees Larry Jones and Brad Ghast.

In February 1984, records clerk Dennis called repairman Jones for voluntary overtime, which involved operation of a crane. Jones declined. Dennis was unable to get anyone else on a voluntary basis. Jones was the least senior repairman qualified to operate the crane. Dennis again called Jones, saying that Jones was forced. Jones asserted that another employee was junior to him. Dennis explained that the other employee was not in the appropriate classification. At this point, Jones said he was sick, and was going home. Mechanical engineering supervisor Claerbout also spoke to Jones, but Jones was persistent. The Company gave Jones a 10-day suspension for insubordination, by allegedly refusing to work overtime when ordered.

Jones filed a grievance over his suspension. At the grievance meeting, Herb Miller asserted that the Company could not selectively force employees to work overtime, or order employees and that Local 702 never agreed otherwise. He stated that for years, he had urged the Company to handle such problems by placing more employees on the overtime lists.

The Company denied the grievance, and Local 702 processed the grievance to arbitration. However, at the arbitration hearing, Local 702 changed its position. In its opening statement, Local 702 asserted that it agreed that if the Company could not obtain anyone on a voluntary basis, the Company could resort the force procedure, and if (in the instant situation) Jones was not sick, he could be forced to work the overtime. Local 702 based its position on its assertion that Jones was sick, and therefore could not be

forced to work (in the present case, Herb Miller testified that Local 702 also contended that the Company used an unreasonably small special repairman classification. However, neither the arbitrators' Decision, nor the record of the arbitration proceeding, indicate such argument). The Company asserted that Jones was malingering.

Arbitrator Marian Warns upheld the grievance. She took cognizance of the force procedure. Arbitrator Warns held: "I accept the logic of the argument of the Union that Jones did not feel it necessary to discuss or report his sickness to anyone as long as he believed he had a choice about whether to work or not. At that point, it was necessary for him to come forward with his reason for not working additional overtime." The Arbitrator noted that under the contract (sec. 10.03), an employee could be disciplined for abusing sick leave. However, Jones had no prior history of abusing sick leave or avoiding overtime. Arbitrator Warns further noted that the Company did not require Jones to see a nurse or doctor, or tell Jones that he had to work overtime or be suspended.

In sum, Arbitrator Warns held that an employee subjected to the force procedure, could, if he believed he had a choice in the matter, simply come forward with a reason for refusing the overtime. The Company had to accept that reason, at least, absent objective proof that the employee was lying, coupled with advance warning that the employee could be suspended or otherwise disciplined if he refused the overtime.

The Ghast matter arose in November 1989. Shift Supervisor Ash called Ghast, among others, for voluntary overtime. Ghast declined, saying he was working on his house. Ash was unable to get any volunteers, and resorted to the force procedure, calling by low seniority. He told Ghast that he was forced, and had to come in. Ghast again refused, saying that he was working on his house. Ash again said Ghast was forced. They had a long conversation. Ash said that if Ghast did not come in, he was subject to discipline.

Ghast again refused, but this time he said he was drinking. Ash said he would discipline Ghast.

The Company issued a written reprimand to Ghast. The Company asserted that Ghast refused overtime even when told he was forced, and he came up with various excuses, including work on a home project, the need for a proper journeymen to apprentice ratio, and finally "came up with drinking." The Company stated that it was apparent he was not going to work, and the Company did not accept his excuse.

Ghast grieved the discipline. The Company initially denied the grievance, asserting that after giving several excuses, Ghast, as a last resort, claimed he was drinking and should not work. On December 12, 1989, Local 702 and the Company met to discuss the grievance. Following their meeting, Manager Baughman agreed to rescind the reprimand, without giving any reason.

Herb Miller testified in sum as follows: He argued that Ghast could not be forced to work overtime, and also, the Company had no reason for saying that he was not drinking. Supervisors present said they didn't believe that Ghast was drinking. They said he should have been fired. Baughman said he didn't know whether Ghast was drinking. He said the Company would withdraw the reprimand.

Baughman, in his testimony, avoided giving a direct answer to the question or whether the Company would accept an employee's statement that he was drinking, if the supervisor or person making the call did not believe it was true. Baughman testified that he became convinced that Ghast had been drinking, and therefore recommended that the discipline be rescinded. He admitted that two of the involved supervisors (Kulhan and Crisp) did not believe that Ghast was drinking. Baughman testified that Herb Miller's position was that Ghast could not be forced because he was drinking; and that Miller did not argue that the Company could not

generally force employees to work overtime. However, then Newton Supervisor Butler, who was present at the grievance meeting, testified that Local 702 may have taken an alternative position that the Company could not discipline an employee for refusing forced overtime. Robert Kulhan, the Company's other witness concerning the grievance meeting, testified that the Company's position was that Ghast was not drinking.

Ghast, unlike Jones in the earlier situation, was given a warning that he would be disciplined for refusing forced overtime. The Newton supervisors did not believe Ghast had been drinking, his shifting explanations gave credence to that belief, and the Company so asserted to Ghast and Local 702. Therefore, I do not credit Baughman's testimony that he became convinced Ghast had been drinking. The Company's failure to give any reason for rescinding the discipline is also significant. It is evident that Baughman recognized that in light of the earlier Jones arbitration decision, the Company had no alternative but to accept Ghast's drinking excuse, whether the Company believed him or not. In light of Butler's admission, I credit Miller's testimony that he argued in the alternative, that Ghast could not be forced to work overtime. Whether Miller did or not, Baughman impliedly conceded that so long as Ghast came up with an excuse for not working forced overtime, whether credible or not, the Company had to accept that excuse.

In October 1979, the Company needed a Newton employee to work overtime on a Friday after 3 p.m. The Company went through the overtime list, but was unable to get anyone. Employee Jerry Barbour had the least seniority in the appropriate classification. The Company told Barbour he had to work. He refused. When his supervisor tried to talk to him, he made an obscene gesture and walked out.

The Company gave Barbour a disciplinary suspension for failure to follow a supervisor's instruction, and failure to

work assigned overtime. The Company stated that the contract provided a procedure for overtime, and Barbour had an obligation to work unless excused by his supervisor.

When Local 702 and the Company met to discuss the matter, Herb Miller did not dispute that Barbour was insubordinate, but disagreed that Barbour was obligated to work overtime. The Company agreed to revise the disciplinary letter by excluding the references to overtime, but reserved the right to discipline employees for overtime refusal, and to use Barbour's case as evidence in any future arbitration.

Manager Baughman became involved in Newton negotiations in 1980, although J.L. Lisenbee was then the Company's chief negotiator. Baughman testified in sum as follows: As of that time the force procedure was in effect. Employees could refuse voluntary overtime, without being subject to discipline. The Company was encountering difficulty in getting volunteers. When the force procedure was used, many employees would not answer the phone, i.e., knowing the purpose of the second call. Consequently, the same junior employees were repeatedly forced to work overtime. The Company had the right to "force" employees,, through the force procedure, to work overtime. To Baughman's knowledge, employees were not refusing forced overtime.

In the 1980 contract negotiations, the Company proposed to amend section 7.01(b) to add the following language: "Employees who continually decline to work their share of overtime will be placed on notice to work overtime. If the employee continues to decline overtime, he shall be subject to disciplinary action."

Local 702 rejected the proposal. The Company never thereafter presented a proposal concerning discipline for overtime refusal. However, Local 702 and the Company

agreed upon a procedure which was later incorporated into their contract as set forth in the July 28, 1982 side letter.

Manager Baughman testified that the Company proposed the additional language for Section 7.01(b) in hopes that it would encourage employees to take voluntary overtime and reduce the number of phone calls needed to obtain employees. In sum, Baughman asserted that the proposal concerned only voluntary overtime, and the Company already had the right to discipline employees who refused forced overtime. However, Baughman testified that the Company was not proposing to eliminate voluntary overtime, and that the proposal would not have remedied the problem of second calls.

The Company's proposal, on its face, made no distinction between voluntary and forced overtime. That fact is particularly significant in light of the then recent dispute involving Jerry Barbour, when Local 702 made clear that it did not believe the Company could discipline employees for refusing forced overtime. Supervisor Butler, who was present at the 1980 negotiations, testified that Local 702, in rejecting the proposal, argued that the Company could change shifts or use supervisors. Significantly, Local 702 did not argue that the proposal was unnecessary because the Company could resort to the force procedure. Local 702's position indicates that Local 702 understood the proposal to apply generally to overtime, whether voluntary or forced.[41]

---

[41] Herb Miller initially testified that the Company asserted it was making the proposal in order to force employees to take their fair share of overtime. Miller subsequently testified that the Company did not make this assertion. He testified that he changed his testimony after examining notes taken by business representative Joe Craddock and the Company at the 1989 negotiations. My examination of the notes indicates (and Miller so admitted in his testimony) that the notes, on their face, are inconclusive as to the basis for the Company's proposal. I attach no weight to Miller's testimony concerning the Company's rationale.

Statements made by the Company in subsequent negotiations tend to indicate a acknowledgment that the Company could not discipline employees who declined overtime, whether voluntary or forced. In 1992, when Local 702 and the Company were engaged in intensive negotiations concerning the overtime procedure, Baughman remarked that they might as well negotiate mandatory overtime, which would be the easiest way to handle the problem. Local 702 representative Tom Carr responded that Local 702 would never agree to mandatory forced overtime.

Coal yard equipment operator Jim Highland habitually refused overtime. When "forced," he sometimes got another employee to go in his place. The Company acquiesced in this practice. At the 1992 negotiating session when Baughman referred to mandatory overtime, he remarked that if all employees had Highland's attitude, no one would volunteer for overtime. The Company never sought to discipline Highland. Other than the cases discussed above, the Company never tried to discipline an employee for refusing either voluntary of forced overtime.

The parties' negotiations with regard to home telephones, further tends to indicate the voluntary nature of callout overtime, whether voluntary or forced. In 1978, Local 702 rejected a company proposal that employees be required to give a phone number where they could be reached for overtime. In 1986, Local 702 rejected a company proposal that all employees have a telephone as a condition of employment. Instead, the parties negotiated, and have included in their contracts, a provision (in sec. 15.02), that: "The point of contact for present employees who do not have a telephone or refuse to give their telephone number to the station will be the employee's time card." It is evident that any employee wishing to avoid calls for voluntary or forced overtime, could do so simply by having no home phone, or using an unlisted number. The penalty for doing so would be

not be discipline. Rather, the penalty would be loss of opportunity to earn overtime pay.

The history of negotiations between Local 702 and the Company, indicates that rather than discipline, the parties repeatedly discussed and sometimes agreed upon methods to encourage employees to take overtime by penalizing them i.e., depriving them of opportunity for overtime when they refused or were unavailable for overtime work.

In 1982, the Company proposed to amend section 7.01(b) to provide that employees who declined overtime would be charged with double the time refused, and that employees who could not be contacted, would be charged with the time which was to be offered. Supervisor Butler testified that the proposal applied to the mechanical maintenance, instrument and electrical departments. Manager Baughman testified that the second proposal was intended to deal with the problem of second or "force" calls, i.e., when employees failed to answer the phone or had family members say they were not at home. Local 702 rejected both proposals. Instead the parties negotiated the agreement which was confirmed in the July 28, 1992 side letter.

The 1992 negotiations regarding Newton overtime procedures are particularly significant. Plant Supervisor Kennedy testified in detail concerning these negotiations. On June 10, 1992, the Company proposed in sum, that eligible employees would be grouped in rotating lists by thirds (one third of eligible employees in each classification) for overtime purposes. Employees in each group would have to work overtime when called, unless excused by their supervisor. If they worked, the next one-third would go to the top of the list. Kennedy testified that the proposal would have resolved the Company's problems by limiting the number of calls, forcing different groups, stop beating on junior employees, and eliminating the need for second calls. Local 702 rejected the proposal, asserting that it did not like the mandatory overtime

inherent in the procedure, and that employees should have the right to refuse overtime.

In July 1992, Local 702 and the Company agreed on a revised arrangement which would apply when an entire classification was not scheduled for overtime. The agreement provided that employees could sign up for the volunteer list. Those who did would not be "forced," unless both the volunteer and forced lists were exhausted. Employees on the volunteer list had to work when called, unless excused. Employees on the volunteer list who failed to respond three consecutive times would be removed from the list for 4 weeks. Kennedy testified that such removal was the penalty for failing to respond to overtime calls.

On August 5, 1992, the parties amended the revised procedure to provide that employees who failed to respond to 75 percent of overtime calls during a 4-week period, would be removed from the volunteer list for a period of 4 weeks. As indicted, the penalty concept remained in the agreement. Kennedy testified that the revised procedure was amended because of employee complaints, and because the Company was not getting enough volunteers.

On August 12, and again on September 3, 1992, Local 702 and the Company agreed upon additional revisions to the revised procedure. On November 12, 1992, the parties agreed to drop the penalty concept. They agreed to review and modify the procedure after January 10, 1993, if the procedure failed to reduce the number of calls. There was no further agreement until August 5, 1993 (during the lockout, when the parties agreed on overtime procedures which were eventually incorporated into the 1992-1995 contract).

It is evident from the foregoing history of Newton overtime procedure negotiations, that Local 702 steadfastly and successfully resisted company proposals which expressly or impliedly indicated that overtime was mandatory. It is further

evident that in 1992, the parties focused their efforts on devising a system which would encourage employees to take overtime calls, by penalizing them for refusals, through methods which would deprive them of overtime opportunities when they wanted such work. It is also evident that the parties eventually came to the realization that such devices were not achieving the desired result.

The history of negotiations between Local 702 and the Company with regard to Newton overtime procedure, and their resolution of grievances, further indicates that both parties recognized that when the Company was unable to get employees for overtime, the Company was free to, and did, make shift changes in accordance with the contract, or use supervisors or subcontractors to perform the work. During the 1992 negotiations, Manager Baughman told Local 702: "If we go through the entire list and don't get anyone, obviously we can put supervisors out there to perform the work, but you guys don't want that and you've told us you don't want that." Baughman's statement is reflected in the Company's minutes of the June 9, 1992 bargaining session. Baughman made this statement during the same period when he suggested that they might as well negotiate mandatory overtime.

As indicated by Baughman, Local 702 did not want to lose overtime work to supervisors or subcontractors. Herb Miller repeatedly told Newton employees that if they did not take overtime work, the Company would use supervisors or subcontractors. The history of grievance resolutions indicates that Local 702 conceded that when the Company was unable to get employees to take overtime, the Company could properly make shift changes in accordance with the contract, or use supervisors or subcontractors to do the work.

A 1991 grievance is illustrative. In July 1992, nonunit engineers performed certain repair work, after all contacted unit employees refused to take the overtime. One of the repairmen filed a grievance. The Company denied the

grievance, asserting that "when the bargaining unit employees will not respond for the overtime required, the Company has no choice but to perform the work with supervisory employees." The Company further noted that where all employees in a classification are needed for an overtime assignment, the procedure set forth in the July 28, 1992 side agreement "would not prohibit the Company from exercising its rights to establish an additional shift in accordance with the provisions of Section 5.03 of the Labor Agreement." Upon ascertaining the facts, Herb Miller declined to proceed with the grievance, because the Company had no alternative for its action.

Maintenance engineer supervisor Kulhan testified that the person who made the calls was not familiar with the force procedure. However, in its response to the grievance, the Company did not so indicate. Moreover, the 1991 grievance did not involved a unique situation.

In September 1984, the Company needed to perform welder work on an overtime basis. The Company made initial calls, but was unable to contact any welder. The Company continued to make calls, and reached welder Ken Matheny, who accepted the call. Meanwhile, a maintenance supervisor performed the work. The Company informed Matheny he was not needed. Matheny filed a grievance, alleging he should have gotten the work. The Company denied the grievance, asserting that its action was: "consistent with past practice of Supervisor doing bargaining unit work when no bargaining unit employees are available." Herb Miller withdrew the grievance. Miller testified that he did so because the Company was confronted with an emergency situation, the Company acted properly, and he agreed with the Company's position.

In September 1986, the Company needed to replace fluffing stones in the dry fly ash silo. The work entailed an extended outage. The Company agreed with Newton stewards

that on a one-time basis, it would establish two 12-hour shifts for the work, and offer such work to repairmen and utilitymen, based on seniority. The Company stated: that it appreciated the 10 stewards cooperation "in meeting our needs for replacing the stones rather than contracting *this* work out." When Herb Miller learned about the arrangement, he told the Company not to do this again, because only he had authority to negotiate new shifts on behalf of Local 702. However, he did not dispute that alternatively, the Company could have subcontracted the work.

In January 1984, coal yard operator Brooks Wells filed a grievance, alleging that the Company used supervisors to perform unit overtime work. The Company needed four employees to do the work. Most but not all eligible employees had worked 16 hours, and therefore could not be called. The Company contacted two other employees who both refused the overtime. Herb Miller testified that the force procedure did not apply to the coal yard. Manager Baughman testified that the Company could have forced the employees to work, but could not explain why this was not done. Instead, the Company used four supervisors to perform the work. Baughman testified that the Company had no choice but to use the supervisors. Miller agreed, and declined to process the grievance.

The Company has on other occasions, made clear its intent to exercise alternatives other than discipline, when unit employees refused overtime. During 1986 negotiations, Herb Miller complained that the Newton janitors should get outage hours, and that the Company used summer help instead of janitors for utility overtime. Manager Baughman countered that the janitors were not responding to callout overtime, so "we said the heck with them," and quit calling them for utility overtime. In 1982, the Company proposed maintenance shift changes, because employees were not taking overtime.

Manager Baughman testified that to his knowledge, Larry Jones and Brad Ghast were the only Newton employees who refused forced overtime. Newton Superintendent Kennedy testified that the Company has disciplined employees for refusing forced overtime. He was unable to identify such employees. In fact, neither assertion was correct. The Company has never succeeded in disciplining a Newton employee for refusing a force call. Employees other than Jones and Ghast have refused or avoided force calls without being disciplined for doing so. As indicated, Jerry Barbour was not disciplined for such reason. Newton electrician John Koehler testified that in the early 1980's he told his supervisor that he did not want to be called for overtime until further notice. The supervisor agreed. Thereafter, for about 1 year, Koehler was not called for either voluntary or forced overtime. In 1988, for a period of about 6 months, Koehler refused to give the Company his phone number.

By way of summation, I have made the following findings with regard to the overtime situation at Newton: (1) During the period form April 24 to May 20, there were no concerted refusals to perform overtime in operations, or where the Company was contractually obligated to fill vacancies on Dupont shifts; (2) all storeroom overtime is voluntary; (3) Newton has contractual procedures for voluntary and "forced" overtime; (4) during the period from April 24 to May 20, employees called for forced overtime gave reasons for their refusals, some of which could be characterized as frivolous; (5) the force procedure was designed to encourage employees to accept overtime calls: (6) under the force procedure, employees may decline the call if they give a reason, and that reason, whether or not credible, must be accepted by the Company: (7) during the period from April 24 to May 20, employees volunteered for overtime, but subsequently withdrew their acceptances; (8) under company practice, this was permissible, and during the period in question, the

Company acquiesced in such withdrawals; and (9) during the period form April 24 to May 20, no unit employee who declined overtime was ordered to work the overtime, or warned or threatened with discipline by reason of such refusals.[42]

In light of the foregoing findings, it follows that at least on an individual basis, the Newton empoyees engaged in permissible refusals to work overtime during the period in question. As indicated, the evidence with respect to the divisions indicates that the Company has historically tolerated and accommodated itself to concerted or union-instigated refusals to work overtime. The evidence fails to indicate any different policy at Newton. Historically the Company, with acquiescence by Local 702, has felt free to use supervisors or contractors when employees were unavailable, for what ever reason, to work overtime. Therefore, I find that the Newton employees were engaged in permissible activity when they refused overtime during the period from April 24 to May 20. I further find that as with the divisions, the employees thereby did not unilaterally change their terms and conditions of employment.

3. Overtime in the Local 148 unit

As indicated, there is no real dispute as to the distinction between voluntary and mandatory overtime in the Local 148 unit. The evidence previously discussed, indicates that during the period in question, unit employees concertedly refused only historically voluntary overtime. In its brief, the Company

---

[42] With regard to my findings concerning the force procedure, I have taken into consideration, grievances and other situations, e.g., as testified to by Supervisor Kulhan, in which Local 702 agreed with the Company that in certain situations, employees could be "forced." However, such statements beg the question, because they do not define the meaning of "forced." As indicated, Local 702 never conceded that forced overtime was mandatory.

does not contend that unit employees improperly refused to perform overtime work during the period from April 24 to May 20.

As discussed, the evidence with respect to the Local 702 units indicates that the Company has historically tolerated and accommodated itself to concerted or union instigated refusals to work overtime. However, there was an arbitration proceeding in the Local 148 unit which at least arguably presented a question concerning the propriety of such conduct.

In 1980, the Company offered Coffeen operators certain overtime work. Chief Steward Bill Beck asserted that the operators should be allowed to perform that work. There was no agreement. Beck, acting on his own, and in disregard of his supervisor's instructions, posted a notice that the operators would not be offered the overtime. The Company discharged Beck. Beck grieved his discharge. Local 148 contended that Beck was discharged for engaging in legitimate union activity. The Company contended that Beck engaged in unprotected activity by initiating a concerted refusal to work voluntary overtime.

Arbitrator Sinclair Kosoff sustained the grievance, holding that the discharge was not for just cause. He held that Beck acted improperly, in that he should have invoked the grievance procedure instead of taking matters into his own hands. The arbitrator held that the fact that overtime was voluntary did not alter the picture. He discussed applicable law which in his view, indicated that a concerted refusal to work overtime violates the no-strike clause of a contract currently in effect. However, he sustained the grievance because in his view, the Company contributed to the problem by initially seeking Beck's approval to offer the overtime to the operators.

I am not persuaded that the Beck arbitration indicates that the Company had any different policy toward Local 148 with

regard to concerted refusals to work overtime, than it had toward Local 702. I am also not persuaded that the arbitrator's decision can be regarded as authoritative on that question. Beck in effect usurped the Company's authority by officially declaring that opeators were ineligible to work overtime. No such conduct is involved in the present case. Moreover, in the present case, unlike the Beck situation, the contract had expired and the no-strike clause was not in effect. Whether a boycott of voluntary overtime equates with a strike, is a matter to be determined in accordance with Board law. In sum, I find that the employees represented by Local 148, like those represented by Local 702, did not unilaterally change the terms and conditions of their employment by concertedly refusing to work voluntary overtime.

G. Analysis and Concluding Findings Concerning the Lock Out

The critical concluding questions concerning the lock out are (1) whether the employees' inside game activities constituted protected activity under the Act, and (2) if protected, whether the Company was privileged to lock out the employees either because of the nature of those activities, the Company's motivation, or for failure of the evidence to meet the standards for finding a violation under Section 8(a)(1) or (3) of the Act.

In *Riverside Cement Co.*, 296 NLRB 840, 841 (1989), the Board held that: "where an action is voluntary, the concerted refusal by employees to perform that action is protected concerted activity and does not constitute an unlawful partial strike." Citing its earlier decision in *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965), the Board explained that: "the vice of a partial strike is the employees' attempt to establish and impose upon the employer their own chosen conditions of employment. Where, as here, the action employees refrain from engaging in is within the employees' discretion, they

cannot be said to be imposing their own terms on the employer."

In *Riverside Cement*, the employer locked out bargaining unit employees for about 1 month, because they refused to comply with a new rule which required them to bring certain personal tools to work. Prior to the rule, the employees were not required to provide those tools, although some did so. When, as a union bargaining tactic, the employees refused to bring those tools to work, the employer promulgated the new rule, and locked out those employees who had previously brought their tools to work.

The Board held that Riverside Cement violated Section 8(a)(3) and (1) by promulgating a discriminatory work rule and discriminatorily withholding work from employees in retaliation for their refusal to comply with the rule. The Board rejected the employer's argument that the union representing the employees sought to unilaterally change an existing custom and practice. The Board held that the employees' historic furnishing of personal tools was a voluntary act which did not establish an implied term and condition of employment. The Board further held that the employer did not engage in a lawful lock out, noting that employer did not lock out the employees either in anticipation of a strike, or in support of the employer's legitimate bargaining position.

As indicated, *Riverside Cement* did not involve a concerted refusal to work overtime. However, *Dow Chemical*, cited by the Board, did involve such refusal. In *Dow Chemical*, the Board held that employees engaged in protected concerted activity by refusing to work voluntary overtime on one weekend, in protest against, a new work schedule. The Board held that therefore, the employer violated Section 8(a)(1) by discharging an employee for participating and playing a leading role in such activity.

In *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168 (1989), decided shortly before Riverside Cement, the

Board held that the respondent union did not violate Section 8(b)(1)(A) and (B) of the Act, by threatening and imposing internal discipline against members who violated a union policy prohibiting members from accepting transfers to nonunit positions. The union initiated this policy in response to a lock out at a different International Paper facility. Subsidiary to its determination, the Board held that as acceptance of such transfers was voluntary, the employees' refusals did not constitute a strike, partial strike, or unilateral change in working conditions; and therefore, the union did not violate the contractual no-strike clause.

Since 1979, the Board has consistently held unlawful, employer discipline imposed upon an employee or employees for concerted refusals to work voluntary, as distinguished from mandatory overtime. In *Jasta Mfg. Co.*, 246 NLRB 48 (1979), enfd. 108 LRRM 2102 (4th Cir.1980), the Board held that the employer violated Section 8(a)(1) by discharging four employees who concertedly refused on three occasions to work overtime. There was no collective-bargaining agreement in effect. The Board held that by reason of shop practice, the employees could reasonably assume that overtime was voluntary and therefore, they did not seek to impose on the employer their own terms and conditions of employment. The Board similarly found employer conduct unlawful in *Imperia Foods*, 287 NLRB 1200, 1203-1204 (1988); and *Vibra-Screw, Inc.*, 301 NLRB 371, 376 (1991). See also, *Sawyer of Napa*, 300 NLRB 131, 137 (1990), in which the administrative law judge cited *Dow Chemical* and *Jasta Mfg.* for the proposition that "when overtime is voluntary, a discharge for a concerted refusal to work such overtime is unlawful, even if the employees withhold their services intermittently."

Board decisions prior to 1979 were not as consistent. Most, but not all, are distinguishable from the present case. *Local No. P. 575, Meat Cutters (Iowa Beef Packers)* 188 NLRB 5, 6 (1971), involved alleged secondary boycott activity. In light

of the broad proscription of Section 8(b)(4)(B), any secondary inducement of work refusals would be unlawful, whether the work in question was mandatory or voluntary. "[T]he Board has found that collective refusals to work (voluntary) overtime can be concerted activity in contravention of the Act if they are intended to achieve a proscribed object." *Hanford Atomic Metal Trades Council (Atlantic Richfield Hanford Co.)*, 227 NLRB 985 (1977), citing *Iowa Beef Packers. Atlantic Richfield* involved a boycott in furtherance of a jurisdictional dispute, proscribed by Section 8(b)(4)(D). In the present case, the Unions had a lawful object, namely, to reach agreement on contracts through collective bargaining.[43]

In *John S. Swiff Co.*, 124 NLRB 394 (1959), enfd. in part, 277 F.2d 641 (7th Cir.1960), the Board held that the employer did not violate Section 8(a)(3) and (1) by discharging 20 employees who concertedly refused to work overtime, in protest of the employer's failure to reach a union contract. Without using the words "voluntary" or "mandatory," the Board found: "The record shows that, on previous occasions, employees who were requested to work overtime normally did so, in the absence of a valid excuse." However, the Board found that the employer violated Section 8(a)(3) and (1) by discharging four employees who refused to cross a picket line established by the other employees.

On review, the court of appeals affirmed the Board's decision with respect to the four employees. Although the matter of the 20 discharged employees was not before it, the court nevertheless stated: "there is no question but what the

---

[43] Other cases cited by the Company in its brief are also not in point. *Graphic Communications Local 229 (Daily Printing)* involved mandatory overtime. Local 702 has cited cases holding that a one-time refusal to work mandatory overtime, is protected activity: *Sawyer of Napa*, supra, *KNTV, Inc.*, 319 NLRB No. 66 (1995), and *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993). However, those holdings are not pertinent, as the present case involves more than a one-time refusal to work overtime.

Company's discharge of the employees who had been asked to work overtime but who had refused was lawful." The court cited as authority, an early decision, *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir.1939).

In *C.G. Conn*, the Board held that the employer violated (then) Section 8(a)(1) and (3) of the Act by discharging employees who engaged in a concerted refusal to work overtime, in protest against prevailing overtime and piecework rates. The Board held that the employees were engaged in protected strike activity (10 NLRB 498, 505 (1938)). On review, the court addressed the question of whether the employees had engaged in a "strike." The Court held that the employees' action did not constitute a "strike," although it characterized the action as "a strike on the installment plan." Neither the Board nor the court spoke in terms of "mandatory" or "voluntary" overtime. However, the court held that the employees did not have the right to work on terms solely prescribed by them. The court declined to enforce the Board's order, holding that there was insufficient evidence that the employer discharged the employees because they engaged in protected union or concerted activity.

As indicated, neither the Board nor the court in the *Swiff* and *Conn* cases, spoke in terms of mandatory versus voluntary overtime. However, the phraseology which they used, tends to indicate that they regarded or assumed the overtime to be mandatory. In *Swiff*, the Board found that employees requested to work overtime, "normally did so, in the absence of a valid excuse." The implication is that absent a valid excuse, overtime, by reason of shop practice, was mandatory. In *Conn*, the Court held that the employees "sought and intended to continue work upon their own notion of the terms which should prevail" (108 F.2d at 397). As discussed, the Board in subsequent decisions has held, in sum, that employees who refrain from engaging in discretionary work, cannot be said to be imposing their own

terms on the employer. In sum, *Swiff* and *Conn* do not support the proposition that employees engage in unprotected activity when they participate in concerted refusals to work voluntary overtime.

In *Decision, Inc.*, 166 NLRB 464, 479 (1961), the Board affirmed a trial examinees decision holding that an employer did not violate Section 8(a)(1) by threatening employees with discharge if they engaged in a concerted refusal to perform overtime work which they had performed "as a matter of practice . . . when needed." The trial examiner held that: "Under such circumstances the working of overtime was a regular job function of the employees involved." As in *Swiff* and *Conn*, the phraseology indicated that by shop practice the overtime was mandatory.

In *Polytech, Inc.*, 195 NLRB 695 (1972), the Board held that the employer violated Section 8(a)(1) by disciplining employees who on one occasion concertedly refused to work overtime. The Board cited as authority, *Washington Aluminum Co.*, 370 U.S. 9 (1962). The Board distinguished *Swiff*, supra, on the ground that in *Swiff*, the employees demonstrated their intent to engage in recurrent partial work stoppages. However, in Polytech, the Board found, in essence, that the overtime was mandatory, because the employees were all told when hired that they had to work overtime when called upon to do so.

In *Illinois Bell Telephone Co.*, 255 NLRB 380, the Board also distinguished *Swift*. The Board held that union stewards had a protected right to advise employees that they had a right to refuse overtime, and that "the record contains no evidence of any refusals to work involuntary overtime."

In *Local 742, Electrical, Radio & Machine Workers (Randall Bearings)*, 213 NLRB 824 (1974), the Board affirmed an administrative law judge's decision, holding that the respondent union violated Section 8(b)(3) by engaging in

refusals to work overtime, in order to force contract modification, without complying with the 60-day waiting period as required by Section 8(d)(4). The union contended that the overtime was voluntary. The Judge held, in sum, that this did not constitute a valid defense.

In the present case, there is no contention that Local 702 or Local 148 failed to comply with the termination requirements of Section 8(d)(4). The contracts had expired, and the no-strike agreements were no longer in effect. In Randall Bearings, the Judge distinguished Dow Chemical, supra, on this ground. Other distinctions drawn by the Judge are of questionable validity. The Judge also distinguished Dow Chemical on the ground that Dow Chemical involved employee rather than union activity. However, in Riverside Cement, supra, the union initiated the employees' refusal to furnish tools. The Judge cited Iowa Beef Packers, supra, as authority that a concerted refusal perform overtime constitutes a strike, whether the overtime is mandatory or voluntary. As discussed, the broad prohibition against secondary boycotts is not pertinent to the present case. In sum, Randall Bearings, to the extent valid, applies only to situations involving alleged failure to comply with the requirements of the Section 8(d) proviso.

In *Price Lithograph Co.*, 205 NLRB 110 (1973), the Board with Member Jenkins dissenting, held that the employer did not violate the Act by replacing an employee who "engaged, at the instance of the union, in a partial strike by participating in a concerted refusal to work overtime." TheBoard so held, notwithstanding that the overtime was voluntary. Member Jenkins dissented, because in his view, the employer violated Section 8(a)(3) by discharging the employee for engaging in protected concert activities.

Prince Lithograph was inconsistent, not only with subsequent Board decisions discussed above, but also with the Board's earlier decision in *Dow Chemical*. Indeed, the

Supreme Court so recognized in *Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, supra, 427 U.S. at 152, fn. 14. In light of the subsequent decisions, in particular, the standards set forth in *Riverside Cement*, and application of such standards in *International Paper*, *Jasta Manufacturing Company*, *Imperia Foods*, and *Vibra-Screw*, it is evident that Prince Lithograph can no longer be regarded as valid Board law. Rather, current Board law stands for the proposition that a union or concerted refusal to work voluntary overtime, in furtherance of lawful contract demands or other lawful object, constitutes protected activity under the Act.

The Board has not, to my knowledge directly passed on the question of whether union or concerted work-to-rule actions constitute activity protected under the Act. In *Hoyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), the Board affirmed an Administrative Law Judge's Decision, that the employer violated Section 8(a)(1) and (3) by refusing to refer an individual for employment because it believed she demonstrated solidarity with employees engaged in a work-to-rule campaign. The status of those employees was not directly at issue. However, the Decision implies that the employees were engaged in protected activity. If they were not, or if there were a question in this regard, the Board or the Judge probably would have so indicated. They did not, but simply indicated that the campaign was "union activity," and consequently protected.

Other decisions tend to indicate that a work-to-rule campaign would constitute protected activity. In *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575 (7th Cir., 1983), the court affirmed a Board determination that the employer violated Section 8(a)(1) by discharging an employee for refusing to operate an ambulance lacking certain emergency medical equipment, required by state law. (The employee acted in concert with other employees). The court

rejected the employer's argument that the equipment related to patient care, rather than the employees' working conditions. The court held: "the motive of an employee who takes an action related to working conditions is irrelevant in determining whether the action is protected." (supra at 578).

Other courts have reached similar results. See: *City Disposal Systems, Inc. v. NLRB*, 766 F.2d 969 (6th Cir., 1985); and *NLRB v. Pace Motor Lines*, 703 F.2d 28 (2d Cir., 1983). In City Disposal Systems, the court upheld the Board's determination that the employer violated Section 8(a)(1) by discharging an employee for refusing to drive a truck which he believed to be unsafe, because the employee's actions "were based on a reasonable and honest belief that he was being directed to perform a task that he was not required to perform under the collective- bargaining agreement," (supra at 972).

If, as indicated by the above decisions, employees have a protected right to refuse to perform tasks which for safety or other reasons, they reasonably believe, whether correctly or not, they are not required to perform, then it follows that employees have a protected right to follow work practices which they reasonably believe, are required by public or Company safety or other rules or regulations. As found, the employees in the present case did just that.

In sum, in the present case, the Company locked out all unit employees in reprisal for the inside game actions, which actions constituted protected activity under the Act. Specifically, those activities consisted of: (1) refusals to work voluntary overtime, or overtime which was otherwise within the allowable discretion of the employee to accept or reject; (2) reasonable work- to-rule practices; and (3) presentation of grievances as a group.

The next question presented is in sum, whether the Company violated Section 8(a)(1) or (3) by locking out the

employees in reprisal for their protected concerted activities. The question can be approached in any of three ways: (1) By regarding the lock out as a per se violation of the Act, because the employees' actions were protected; (2) by applying a *Wright Line* test;[44] or (3) by determining whether the lock out was "inherently destructive" of important employee rights. See *International Paper Co.*, 319 NLRB No. 150, slip op. at 15 (1995).

I would rule out the first approach, in view of the defenses raised by the Company in the present case, and questions posed by the Supreme Court's Decision in *Machinists and Aerospace Workers v. W.E.R.C.*, supra. The second (*Wright Line* test) applies to "cases alleging violations of the Act that turn on employer motive." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993). The finding of a violation under Section 8(a)(3) normally turns on whether the employer, by engaging in discriminatory conduct, was motivated by an antiunion purpose. However, some conduct is so inherently destructive of employee interests, that it may be deemed proscribed without need for proof of an underlying improper motive. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). In this latter situation, the "inherently destructive" test applies.

I shall first apply the *Wright Line* test to the facts of the present case. However, this is not what might be described as a garden variety case under Section 8(a)(3), e.g., where an employer allegedly takes action against an employee or employees in order to thwart a union organizational campaign. Framing the issue in *Wright Line* terms, itself presents a question. I agree (as qualified) with the Company's formulation of the issue in *Wright Line* terms (Br. 120), namely: did the Company lock out its Local 702 and Local

---

[44] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

148-represented employees as an act of discrimination in order to harm or punish them for engaging in concerted activities; or as a reasonable act of business judgment to support its bargaining position and cope with economic adversities caused, and expected to be caused, by the employees' concerted activities? I do so with the qualification that the first alternative represents General Counsel's obligation to present a prima facile case, and the second alternative being the Company's burden to rebut that case.

I find, upon consideration of the evidence, that General Counsel presented a prima facie case that the Company locked out the bargaining units employees as an act of discrimination, in order to harm or punish them for engaging in concerted activities. In this regard, the following factors are particularly significant: (1) The Company's expressed anger, in pre-lock out discussions that the employees "were getting the best of both worlds," by "putting pressure on the Company while still getting their paycheck for the daytime work"; (2) Manager Baughman's assertion, with regard to proposed work-to-rule activities, that the Company "was not going to put up with this shit." This, notwithstanding that none of the suggestions violated Company rules or policy. Baughman refused to indicate that any of the suggestions should not be followed, and Baughman made his statement at a time when the Company could not yet assess the impact of work-to-rule activities; (3) Evidence that the asserted refusals to provide information to supervisors, given as a reason for the lock out, in fact reflected the Company's determination that it would not tolerate group presentation of grievances, as part of the inside game activities. The Company failed to present even an arguable excuse for retaliating against such protected conduct; (4) The Company's demonstrated willingness to work its supervisors and other non-unit personnel harder during the lock out than before May 20, even to the point of requiring them to live at their work place,

all in order to teach the employees a lesson in the futility of protected inside game activities; and (5) the Company's inconsistent, contradictory and in some respects implausible explanations for the lock out.

I further find that the Company failed to meet its burden of demonstrating that it locked out the employees "as a reasonable act of business judgment to support its bargaining position and cope with economic adversities caused, and expected to be caused, by the employees' concerted activities."

An employer may lawfully lock out his employees, after a bargaining impasse has been reached, "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). In the present case, there was no impasse in bargaining with either Local 702 or Local 148. The Company's professed desire to reach agreement on contracts, was irrelevant to its decision to lock out the employees. As discussed, the Company was in no hurry to reach agreement and was perfectly willing to extend the status quo indefinitely. Also as discussed, the lock out had an immediate and predictable effect of frustrating rather than facilitating agreement with Local 148.

The Company did not lock out the employees in anticipation of a well-timed strike. As discussed, the Company was well aware of what went on at union meetings. The Company knew that Local 702 engaged in the inside game activity as an alternative, rather than prelude to strike action. The Company was well prepared to meet a strike, preferred that the Unions strike, and was disappointed, frustrated and angry, when the employees resorted to the inside game activity rather than strike.

The Company did not lock out the employees as a means of maintaining normal operations in the face of overtime boycott

and work-to-rule activities. The Company did nothing after May 20 that it could not have done during the period from April 24 to May 20, and with less burden to its nonunit personnel. The Company could have transferred nonunit personnel, if necessary, to perform boycotted overtime work, without forcing them to perform all unit work at great inconvenience to themselves. The Company could, as it did, resort to subcontracting. The Company could, as it did after May 20, purchase power from other utility firms. In the circumstances, the use of a lockout was a case of overkill, which went beyond any reasonable need to maintain normal operations.

In sum, the lock out was punitive rather than remedial. The Company failed to meet its burden of demonstrating that it locked out the employees for legitimate business reasons, rather than as an act of reprisal to punish the employees for engaging in protected concerted activities, and to discourage the employees from engaging in such activities.

There remains a question of whether *Machinists & Aerospace Workers v. WERC*, may be considered as authority for the proposition that regardless of motivation, an employer is privileged to counter a legitimate union campaign of overtime boycott and/or work- to-rule practices, by resorting to lock out.

Machinists & Aerospace Workers involved a question of preemption. In that case, the collective-bargaining contract between the employer and the union expired and the parties failed to reach agreement on a new contract. The employer unilaterally implemented certain proposed changes from terms established under the expired contact. The union responded by initiating an overtime boycott. The employer then decided not to implement the proposed changes. Instead, while negotiations continued, the employer filed an unfair labor practice charge with the Board alleging that the overtime boycott violated Section 8(b)(3) of the Act.

The Board's Regional Director administratively declined to proceed on the charge, on the ground that the boycott did not appear to be in violation of the Act. However, the employer also filed a charge with the Wisconsin Employment Relations Commission, alleging that the boycott violated state law. The Commission decided that it had jurisdiction of the matter, and held that the boycott was an unfair labor practice under Wisconsin law. The union contended that the overtime was voluntary, but the Commission did not decide whether the overtime was voluntary or mandatory. The Wisconsin state courts affirmed the Commission's order.

The United States Supreme Court granted certiorari and reversed the state decision. The Supreme Court held that the subject matter was preempted by Federal law. However, the Court added that: "Moreover, even were the activity presented in the instant case "protected" activity with the meaning of Section 7, economic weapons were available to counter the union's refusal to work overtime, e.g., a lock out (citing *American Shipbuilding*), and the hiring of permanent, replacements under *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938)."

In *NLRB v. Brown Food Store*, 380 U.S. 278, 292, fn. 6 (1965), decided as a companion case to *American Shipbuilding*, the Court stated that it was not deciding whether, in conjunction with a lawful lock out (there, in response to a whip saw strike), an employer could hire permanent replacements under the rule of Mackay Radio. Since *Brown Food Store* and *American Shipbuilding*, the Supreme Court had not reviewed any Board decision involving the legality of a lock out or lock out-related action by an employer. In *International Paper Co.*, supra, the Board recently held that an employer violated Section 8(a)(3) when, pursuant to a lawful lock out, the employer permanently subcontracted unit work in order to bring economic pressure

to bear in support of its bargaining position in contract negotiations.

The above-quoted statement in *Machinists & Aerospace Workers* plainly was dicta. It is unlikely that after carefully limiting and defining its rulings in *Brown Food Store* and *American Shipbuilding*, the court in a preemption case, and without benefit of a Board decision, would go beyond its previously limited rulings, and proceed to define what course or courses of conduct an employer could take a response to an overtime boycott. Rather, the court simply indicated that the employer had lawful means of countering an overtime boycott, without defining the limitations upon or use of such means. Moreover, the question of employee's motivation was not presented in *Machinists and Aerospace Workers*, and the court did not have the benefit of subsequent Board decisions which placed in question the continued validity of *Prince Lithograph*, to which the court attached significance. In the present case, evidence was presented concerning the Company's motivation and means other than lock out, by which the Company could counter the overtime boycott and work-to-rule actions. In sum, *Machinists and Aerospace Workers* does not constitute authority for the proposition that an employer may lawfully lock out its employees in response to an overtime boycott, regardless of the employer's motivation, alternative means to counter the boycott, or whether the employees' activity was in whole or part, protected under Section 7 of the Act. For the foregoing reasons, I find that the Company violated Section 8(a)(1) and (3) by locking out the employees in the Local 702 units and the Local 148 unit. Having made that determination, and specifically, that the lock out was discriminatorily motivated with respect to both unions, I find it unnecessary to decide whether, as alleged by General Counsel, the Company violated Section 8(a)(5) by locking out the Local 148 unit, insofar as the lock out was directed against Local 702.

As the evidence establishes a violation under the *Wright Line* standard, it is not necessary to determine whether the lock out would be unlawful under the "inherently destructive" test. Assuming that it were necessary to make that determination I would still find the lock out to be unlawful. In reaching this conclusion, I have followed the guidelines spelled out by the Board in International Paper, slip op. at pp. 14-23.

First, the Company's conduct, discriminatorily directed against employees represented by Local 702 and Local 148, was inherently destructive of important employee rights. Specifically, these rights include the rights to present grievances as a group, to decline voluntary overtime, and to follow work-to- rule practices which the employees believed, or reasonably could believe, were required by public or Company rules and regulations.

The employees represented by Local 702 were locked out for more than 3 months. The employees represented by Local 148 were locked out for more than one month. As a consequence of the unlawful lock out of the Local 702 units, the Local 148 employees remained out of work for the entire duration of the lock out. Plainly, the lock out caused severe harm to the employees. The lock out also had a predictably chilling effect on the employees' exercise of their statutory rights, which would extend beyond resolution of the contract negotiations. The focus of the Company's action was on the employees' conduct, rather than on any professed desire to reach agreements on a contract. Therefore, the lock out had a predictable effect of discouraging employees in the future from exercising their rights e.g., by presenting grievances as a group, or declining voluntary overtime, whether individually, (invoking a contractual or arguably contractual right) or in concert in support of grievances. For these reasons, the lock out cannot be characterized as having only a "comparatively slight" adverse effect on employee rights. Therefore, under

the "inherently destructive" standard, the lock out was unlawful even if the Company came forward with evidence of legitimate and substantial business justifications for its action (which as found, it did not). See, *Esmark, Inc. v. NLRB.*, 887 F.2d 739, 748 (7th Cir.1989) (cited by the Board in *International Paper Co.*); and *Carlson Roofing Co. v. NLRB*, 627 F.2d 77 (7th Cir.1980).

H. Termination of Health Insurance Coverage and Workers' Compensation Supplemental Benefits

It is undisputed that upon commencement of the lock out, the Company terminated the health insurance coverage of employees in the Local 702 units, effective May 20, 1993, although entitlements to such coverage had accrued for the full week ending May 22, 1993. In late July, the Company was informed that General Counsel found merit in Local 702's charge with respect to termination of coverage for May 21 and 22. The Company thereupon provided retroactive coverage for that period. No claims were filed and unpaid for May 21 and 22.

The Local 702 and Local 148 contracts each provided for supplemental workers' compensation benefits. In sum, most employees who were injured and disabled in the course of their employment and unable to return to their regular duties, were entitled to receive the difference between their workers' compensation payments and 80 percent of their regular pay at their straight time hourly rate, for absence on their regular work days, subject to certain limitations. Alternatively, by practice, the Company could assign injured employees to light duty, in lieu of their being off and on workers' compensation. If not assigned to light duty, the employees were entitled to remain on workers' compensation and to receive the supplemental benefits.

As of May 20, 15 employees in the Local 702 units and 6 employees in the Local 148 unit were receiving supplemental

benefits, and 6 employees in the Local 702 units were on light 97 duty. On May 20, the employees on light duty were locked out together with all other employees in the units. The Company did not pay any workers' compensation supplemental benefits during the lock out.

As the lock out was unlawful, it follows that the denial of workers' compensation supplemental benefits by reason of the lock out was also unlawful. Employees in both the Local 702 and Local 148 units would be entitled to reimbursement for the denial of such benefits, even if the denial of benefits were not alleged as a separate unfair labor practice.

The Company argues (Br. 211-212) that it had a legitimate and substantial business justification for its cessation of benefits, in that such cessation was based on a nondiscriminatory, reasonable and arguably correct interpretation of the contracts. As the lock out and accompanying denial of wages and benefits were discriminatorily motivated, and inherently destructive of important employee rights, the Company's assertion, even if correct, would not constitute a viable defense. *Amoco Oil Co.*, 285 NLRB 918 (1987). Moreover, I do not agree that the Company presented a reasonable and arguably correct interpretation of the contracts. The Company argues that the contracts provide for supplemental benefits only when employees are unable to return to work because they are injured and disabled. However, the contracts do not say this. Rather, the contracts simply provide that "a regular employee who is injured and disabled in the course of his employment and who is unable to return to his regular duties shall receive" supplemental benefit payments i.e., without regard to whether other factors would prevent the employee from returning to work.

In sum the Company violated Section 8(a)(1) and (3) by terminating health coverage and failing to pay workers' compensation supplemental benefits.

I. Alleged Failure or Refusal to Furnish Information Requested by Local 702

1. Information concerning Newton subcontracting grievances

By letter dated March 15, 1993, Local 702 business representative Dan Miller requested of Manager Baughman as follows:

> Re.: Newton Grievance
>
> Dear Mr. Baughman:
>
> Since it appears we are unable to resolve any of the grievances at Newton regarding subcontracting of work, I will need further information to determine the accuracy of the Company's responses and the validity of the grievances. For each pending subcontracting dispute in 1992-1993 including the transformer issues of 1991) - please furnish the following information:
>
> (1) Name of firm that subcontracted.
>
> (2) The specific work covered.
>
> (3) Date of subcontract and expected or guaranteed completion date.
>
> (4) Man-hours worked by subcontractors' employees under the contract and overtime hours worked by employees affected by such subcontracting, who are represented by Local Union 702.
>
> (5) Whether work would be continuous, occasional or a single time.
>
> (6) The reason the job was subcontracted.

Please respond within one week. If you have any questions regarding this request, please feel free to contact this office.

The grievances referred to by Miller were included among pending unresolved Newton grievances which were on the table in the 1993 contract negotiations.

At the next bargaining session on March 18, Baughman said he would get back to Miller on the matter. By letter dated April 12, Baughman told Miller that he would respond to the request "following the proper research into the questions raised." At the May 7 bargaining session, Miller asked when he would get the information. Baughman responded that he would sent it to Miller whom he had the time.

Miller heard nothing further from Baughman about the request until February 25, 1994, after the parties had reached agreement on 1992-1995 contracts. By letter of that date, Baughman enclosed information pertaining to three of the five pertinent grievances. By letter dated March 17, 1994, Baughman enclosed information pertaining to the other two grievances.

By letter dated April 27, 1994, Miller complained that Baughman's "delayed responses" failed to include all of the requested information. Specifically, Miller requested to know the work originally subcontracted (as distinguished from work completed) and the expected or guaranteed completion date (as distinguished from actual start and stop date).

By letter dated June 23, 1994, Baughman furnished Miller with information in response to Miller's April 27 letter, together with 33 pages of documents purporting to be contracts with the subcontractors. The letter, but not the documents, were introduced in evidence. There was no further communication concerning Miller's request. As of the present hearing, the grievances were still pending arbitration.

Miller testified in sum as follows: Baughman's responses were untimely, because contract negotiations were concluded in January 1994. He needed the information not only in connection with the grievances, but also to determine whether the Company was complying with the contract, and also, what modifications would be needed if Newton language could be used as a basis for subcontracting language in the division

contracts. However, he did not so inform Baughman. The information sent by Baughman (including the June 23, 1994 submission), was still incomplete. The information failed to include the time frame as requested in item 3 of Miller's initial request. Miller made no further request, because he was now prepared to proceed to arbitration. The Company never said that any of the requested information was irrelevant.

Manager Baughman testified in sum as follows: Miller never said that the request pertained to contract proposals on subcontracting. Baughman understood that the request related only to the Newton subcontracting grievances. As of March 15, 1993, Baughman's office included his secretary, and labor relations representative Tim Dunham. Another assistant left the Company on March 5, but was not replaced. However, Baughman would normally obtain the requested information through the plant superintendent. In April, Baughman was busy with the contract negotiations and overtime boycott. After May 20 he was involved with the lock out, as was Newton plant superintendent Kennedy. Dunham was assigned to the southern division during most of the lock out. Baughman was also involved in dealing with pending unfair labor practice charges, Local 702's lawsuit over medical insurance and related depositions. After Local 702 and the Company reached agreement on a contract, he responded to Miller's request.

General Counsel contends (Br. 47,135-136) that the Company never furnished all of the requested information. This has not been proven. Local 702 concedes (Br. 258) that by June 23, 1994, the Company had furnished the requested information. On its face, Baughman's June 23, 1994 letter appears to respond to Miller's remaining questions. Moreover, I could not make a definitive determination that Baughman's letter was inadequate or incomplete, without considering the documents which he sent with that letter. As indicated, those documents were not offered in evidence.

However, I find that the Company arbitrarily and unreasonably delayed in furnishing the requested information, and that such delay was prejudicial to Local 702. The requested information was relevant and necessary to Local 702's performance of its duties as bargaining representative. Local 702 needed the information in order to determine whether the Company violated section 1.07 of the Newton contract (previously quoted) by contracting out the work at issue. The pending Newton grievances were on the table as matters which could be resolved in the contract negotiations. Although the Company indicated that it preferred to resolve the grievances outside of the negotiations, Local 702 did not agree. By failing to provide any of the information until after negotiations were completed, the Company effectively precluded resolution of the grievances within the framework of contract negotiations. Historically, the parties had sometimes resolved grievances within contract negotiations.

The Company offered no valid excuse for promptly furnishing Local 702 with the requested information. By March 15, 1993, the Company had furnished responses to all but two of the grievances, thereby indicating that it had investigated the matters. No unusual events were occurring between March 15 and April 24, 1993 which would have so preoccupied Baughman, Dunham or superintendent Kennedy from promptly obtaining and furnishing the requested information. There were no negotiating sessions between the Company and Local 702 during the period from March 19 to May 7, and no negotiations between the Company and Local 148 during the period from March 25 to April 22. I also agree with General Counsel's argument (Br. 136), that the Company cannot validly use its own unlawful lock out as an excuse for failure to comply with its collective-bargaining obligations. I find that the Company violated Section 8(a)(1) and (5) by failing and refusing to promptly furnish Local 702

with the requested information. See, *Baldwin Shop 'N Save*, 314 NLRB 114, 124 (1994).

2. Information Concerning Power Purchases

By letter dated June 8, 1993 (during the lock out), Dan Miller requested Baughman to furnish, within 48 hours, information as to all power purchased by the Company from other suppliers since May 20, including the amount of KW purchased from each supplier. By letter dated June 11, Baughman responded that the request did not pertain to unit terms and conditions of employment, and he needed to know the reason for the request. On June 16, 100 Local 702 counsel told Company counsel that Local 702 wanted to know whether other power companies were performing struck work. On June 19, Company counsel informed Local 702 counsel that the Company would not provide the requested information "on your struck work/ally doctrine request." On July 20, the Company rejected a similar request for information concerning power purchases from a named utility firm. On November 8 (after the lock out), the Company furnished the requested information in response to a subpoena in a lawsuit brought by Local 702. As discussed, the information indicated that the Company greatly increased its purchases of power during the lock out.

General Counsel contends that the requested information was relevant and necessary for collective-bargaining, and that the Company unlawfully failed and refused to furnish the information in a timely fashion. I agree. The requested information pertained to actual or possible erosion of Newton unit work, which in turn was precipitated by the Company's unlawful lock out. Therefore, the information was pertinent to the terms and conditions of employment of unit employees. A bargaining representative is entitled to information as to whether and to what extent during a strike or lock out, the employer is using outside firms to perform unit work. *C-Line*

Express, 292 NLRB 638, 644 (1989); *Central Soya Co.*, 288 NLRB 1402, 1406 (1988). Therefore, the Company violated Section 8(a)(1) and (5) by failing and refusing to furnish the requested information in a timely manner.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 702 and Local 148 are labor organizations the meaning of Section 2(5) of the Act.

3. The following employees of the Company each constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All operations and maintenance employees employed at the Company's Newton Power Station; but excluding all employees represented by other labor organizations, guards, professional employees, office clerical employees, and supervisors within the meaning of the Act, and all other employees (Newton Unit).
>
> All employees employed in the Production Department at the Company's Grand Tower Power Plant; and all operations and maintenance employees employed in the rest of the Company's Southern Division; but excluding all employees represented by other labor organizations, guards, professional employees, office clerical employees, and supervisors within the meaning of the Act, and all other employees (Southern Unit).
>
> All operations and maintenance employees employed in the Company's Western Unit; but excluding all employees represented by other labor organizations, guards, professional employees, office clerical employees and supervisors within the meaning of the Act, and all other employees (Western Unit).

All operations and maintenance employees employed in the Company's Eastern unit; but excluding all employees represented by other labor organizations, guards, professional employees, office employees, and supervisors within the meaning of the Act, and all other employees (Eastern Unit).

4. At all times material, Local 702 has been and is, the exclusive collective- bargaining representative of the Company's employees in the units described above.

5. The following employees of the Company constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees of the Company employed at the generating plants known as Coffeen, Grand Tower, Hutsonville, and Meredosia, in classifications which are covered by that collective bargaining agreement by and between the Company and Local 148, effective by its terms from July 1, 1989 through June 30, 1992.

6. At all times material, Local 148 has been and is, the exclusive collective- bargaining representative of the Company's employees in the unit described above.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By discriminatorily locking out its employees and denying them accrued benefits, thereby discouraging membership in the Unions, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

9. By failing and refusing to furnish and promptly furnish Local 702 with requested information which is relevant and necessary to Local 702's performance of its function as

collective-bargaining representative, the Company has engaged, and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Company be ordered to offer to each of the locked out employees in the Local 702 and Local 148 units, immediate and full reinstatement to their former jobs, to the extent the Company has not done so, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits, including health insurance coverage and supplemental workers' compensation benefits, that they may have suffered from the inception of the lock out to the date of the Company's offer of such reinstatement. I shall further recommend that the Company be ordered to expunge from their records any reference to the unlawful lock out, to give each of them written notice of such expunction, and to inform them that the Company's unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173

(1987).[45] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of reimbursement due.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[46]

ORDER

Respondent Central Illinois Public Service Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 702, International Brotherhood of Electrical Workers, AFL-CIO, International Union of Operating Engineers Local 148, AFL-CIO, or any other labor organization, by discriminatorily locking out employees, denying them health care coverage, supplemental workers' compensation payments, or other contractual benefits, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

(b) Locking out employees, denying them benefits, or otherwise discriminating against them, because they or other employees refrain from working non- mandatory overtime, participate in work-to-rule actions, present grievances as a group, or otherwise engage in protected concerted activities for mutual aid and protection.

---

[45] Under *New Horisons*, interest on and after January 1, 1987 is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. 6621.

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Failing or refusing to bargain collectively in good faith with Local 702 as the exclusive representative of its employees in the Newton, Southern, Western and Eastern Units, by failing or refusing to promptly furnish Local 702 with information which is relevant and necessary to its function as such representative.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer to each of the locked out employees in the Local 702 and Local 148 units, immediate and full reinstatement to their former jobs, to the extent Respondent has not already done so, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits, including health insurance coverage and supplemental workers' compensation benefits, that they may have suffered from the inception of the lock out on May 20, 1993 to the date of Respondent's offer of such reinstatement, by reason of the unlawful lock out and denial of benefits, as set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the unlawful lock out, and notify each of them in writing that this has been done and that evidence of the lock out and reasons for the lock out will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and reimbursement due.

(d) Post at its Springfield, Illinois headquarters and at each of its facilities in the state of Illinois, copies of the attached notice marked "Appendix."[47] Copies of said notice on forms provided by the Regional Director for Region 33, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 33, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. May 20, 1996

---

[47] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BBOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Local 702, International Brotherhood of Electrical Workers, AFL-CIO, International Union of Operating Engineers Local 148, AFL-CIO, or any other labor organization by discriminatorily locking out employees, denying them health care coverage, supplemental workers' compensation payments, or other contractual benefits or in any other manner discriminating against them with regard to their tenure or employment or any term or condition of employment.

WE WILL NOT lock out employees, deny them benefits, or otherwise discriminate again them, because they or other employees refrain from working non-mandatory overtime, participate in work-to-rule actions, present grievances as a group, or otherwise engage in protected concerted activities for mutual aid and protection.

WE WILL NOT fail or refuse to bargain collectively in good faith with Local 702 as the exclusive representative of our employees in the Newton, Southern, Western and Eastern Units, by failing or refusing to promptly furnish Local 702 with information which is relevant and necessary to its function as such representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer to each of the locked out employees in the Local 702 and Local 148 units, immediate and full reinstatement to their former jobs, to the extent we have not already done so, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits, including health insurance coverage and supplemental workers' compensation benefits, that they may have suffered from the inception of the lock out on May 20, 1993 to the date of our offer of such reinstatement, by reason of the unlawful lock out and denial of benefits, with interest.

WE WILL expunge from their files any reference to the unlawful lock out, and notify each of them in writing that this has been done and that evidence of the unlawful lock out, and reasons for the lock out will not be used as a basis for future personnelactions against them.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(3)

No. 00-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR L. SMITH*
STUART I. COHEN
ROBERT S. SEIGEL
HUSCH & EPPENBERGER, LLC
100 N. Broadway
Suite 1300
St. Louis, Missouri 63102
Phone: (314) 421-4800

Attorneys for Intervenor
Central Illinois Public Service Co.

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

25pp

Certificate As To Parties

All parties appearing before the National Labor Relations Board and in this Court are listed in the caption.

Pursuant to FRAP Rule 26.1, Central Illinois Public Service Company ("CIPS") states that it is a subsidiary of Ameren Corporation ("Ameren"), a publicly traded company. No publicly traded company owns more than 10% of the common stock of Ameren. CIPS is engaged in the distribution of electricity and gas. In May 2000, CIPS transferred its electric generation assets to its affiliate, Ameren Energy Generating Company, a wholly owned subsidiary of Ameren.

Table Of Contents

	Page
Table Of Authorities	iv
Statement Of The Case	1
Argument	3
I. The Unions Have Completely Distorted The Holdings Of The NLRB And The Court Of Appeals.	3
II. The NLRB's Holding Is Consistent With, If Not Compelled By, This Court's Precedents.	7
III. The NLRB's Holding Is Consistent With, If Not Compelled By, Its Own Precedents.	13
Conclusion	19

Table Of Authorities

Cases:	Page
American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965)	*5, 7*
Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949)	9
Carpenters Local 370 (Eastern Contractors Assn, Inc.), 332 NLRB No. 25 (2000)	18
Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987)	6
Highland Superstores, 314 NLRB 146 (1994)	14-15
Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir. 1971), cert. denied, 404 U.S. 858 (1971)	17
Int'l Brotherhood of Boilermakers v. NLRB, 858 F.2d 756 (D.C. Cir. 1988)	16
Int'l Paper v. NLRB, 115 F.3d 1045 (D.C. Cir. 1997)	15
Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Com'n, 427 U.S. 132 (1976)	4-5, 9-10
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)	6, 15
NLRB v. Brown, 380 U.S. 278 (1965)	8-9, 10, 12-13

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 6

NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960) 5, 10

NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957) 12

NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987) 6

Riverside Cement Co., 296 NLRB 840 (1989) 15-16

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 10

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 10

Thrift Drug Co., 204 NLRB 41 (1973), enforced, 491 F.2d 751 (3d Cir. 1974) 17

Other Authorities:

II Davis & Pierce, *Administrative Law Treatise* (3d Ed. 1994) 18

Industrial Union Department, AFL-CIO, *The Inside Game: Winning With Workplace Strategies* (1986) 1

Note, 85 Harv. L. Rev. 680 (1972) 11

Statement Of The Case

Petitioners ("the Unions") represent approximately 1,500 employees of intervenor Central Illinois Public Service Co. ("CIPS"), which is a public utility supplying electricity and natural gas in central and southern Illinois. App. 17a; 70a. In 1992 and 1993, CIPS and the Unions were negotiating a new collective bargaining agreement. In March 1993, CIPS submitted its final proposal to both Unions. *Id.*

The Unions rejected this proposal, but they did not call a strike. The Unions thought that a strike was too risky because of the possibility of permanent replacements. App. 21a. Instead, they decided to implement an "inside game" – an alternative that they thought would be just as effective as a strike but without the risk. *Id.*

The inside game consisted of refusal to work overtime and working strictly to rule. The work to rule tactics included slavish adherence to the exact terms of all company rules; doing exactly and only what they were told; reporting precisely on time; leaving company trucks at the company facilities; and presenting all grievances en masse. App. 18a.

The purpose of the inside game was to put economic pressure on CIPS to accede to the Unions' bargaining position. App. 21a. The AFL-CIO has described the inside game as "a strike that isn't a strike but just looks and feels like a strike" – a tactic that may be "more appropriate and effective" than a strike. Industrial Union Department, AFL-CIO, *The Inside Game: Winning With Workplace Strategies*, at 5, 22 (1986).

As the NLRB found, the inside game – particularly the refusal to work overtime – was "an economic weapon

used in support of the Unions' bargaining position" which "furthered the Unions' interests in contract negotiations." App. 28a-29a. After enduring that pressure for four weeks, CIPS locked out the Unions. On the day of the lockout, CIPS mailed a letter to each member of the Unions.[1] That letter complained about the inside game and the pressure it was bringing on CIPS. It also recounted the history of the bargaining effort and the substantial concessions that CIPS had made. It complained of the Unions' refusal to submit CIPS' modified proposals to the membership for vote. It concluded by stressing CIPS' desire "to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date." App. 27a.

The NLRB found that the lockout was "in response to" the inside game. App. 21a. Based on the letter, however, it also found that "a purpose of the lockout was to affect the outcome of negotiations." App. 28a. Certainly, the Unions were in no doubt of CIPS' objective. In briefing before the NLRB, they stated that it was "obvious" that the lockout would end if the Unions agreed to CIPS' proposals, and any suggestion to the contrary was both "ridiculous" and "absurd."

The ALJ found that the purpose of the lockout was to "harm or punish" the Unions for engaging in protected conduct. App. 242a. The ALJ also found that CIPS had no valid business purpose for the lockout, based primarily on the ALJ's own views about the alternatives available to CIPS. App. 243a-244a.

---

[1] The Unions purport to quote the "relevant" portions of this letter. Pet. at 3 n.2. In fact, they have quoted it just as "selectively" as did the administrative law judge ("ALJ") – a tactic that the NLRB criticized. App. 26a.

The NLRB reversed both findings. It found, as a matter of fact, that CIPS was not motivated by anger at the employees or a desire to punish them. App. 34a. It held, as a matter of law, that an employer could use its own economic weapons in response to a union's use of an economic weapon, such as the inside game, to pressure the employer. App. 25a. The NLRB reasoned that there is no meaningful distinction between a lockout in support of the employer's bargaining position and a lockout in opposition to a strike or an inside game. App. 28a. Under this reasoning, "a lockout in opposition to the inside game is perforce a lockout in opposition to the Unions' bargaining position, and in support of Respondent's bargaining position." App. 30a.

Thus, the NLRB has adopted a policy of strict neutrality when the parties to a collective bargaining relationship deploy their economic weapons. If a union deploys an economic weapon such as the inside game, the employer may respond with its own economic weapons such as a lockout.

Argument

I. The Unions Have Completely Distorted The Holdings Of The NLRB And The Court Of Appeals.

The sole basis on which the Unions seek certiorari is the alleged public importance of the NLRB's decision in this case. According to the Unions, the NLRB has authorized employers to engage in a "retaliatory lockout to harm and punish employees for engaging in protected, concerted activity." Pet. at 10 n.6. They repeatedly characterize the lockout as a "reprisal" against protected, concerted activity. *E.g.*, Pet. at 6; 12; 15-17;

23. These characterizations are the sole basis for the Unions' assertion that the NLRB's holding is "a radical break" with prior law and "a plain misreading of this Court's lockout decisions." Pet. at 10-11.

The Unions can make these characterizations only by distorting the NLRB's actual holding and ignoring its rationale. The NLRB did not hold that CIPS could lock out its employees in order to punish them for engaging in protected activity. It stated that the "question in this case" is whether CIPS could "counter the Unions' economic weapon with an economic bargaining weapon of its own." App. 22a. The NLRB found that the Unions had "commenced economic warfare" by using the inside game as a "weapon" to "secur[e] agreement on their terms." App. 25a. It held that CIPS could "defend against this weapon with a lockout in order to force the Unions to yield." *Id.* In short, the NLRB held that an employer could use its own economic weapons in response to a union's resort to economic weapons.

The holding that parties to the collective bargaining process may deploy their economic weapons free from intrusive oversight by the NLRB is mainstream labor law. Indeed, the NLRB's holding follows this Court's explicit invitation to adopt that precise rule. In *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Com'n*, 427 U.S. 132 (1976), this Court suggested:

> It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case . . . are "protected activities" within the meaning of § 7, *although not so protected as to preclude the use of*

> *available countervailing economic weapons by the employer.*

427 U.S. at 152 n.14 (emphasis added).

The NLRB's holding thus leaves the parties to a collective bargaining relationship free to deploy their economic weapons without intrusive NLRB oversight. As the NLRB recognized:

> [T]he tools of economic warfare are so directly related to the substantive bargaining positions of the parties, that undue regulation of the former will inevitably enmesh the Board in an impermissible control of the latter.

App. 29a, *citing American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

The repeated characterization of the lockout as a "reprisal" against protected activity is pure semantics. The NLRB opinion uses that word once, quoting the ALJ's findings. App. 19a. The NLRB itself held only that the lockout was "in response to" the inside game. App. 21a. It expressly:

> reject[ed] the judge's findings that the Respondent was really inspired by "anger" against employees for engaging in their protected inside game activities and that the lockout was a way to "punish" them.

App. 34a. Thus, the NLRB expressly rejected the Unions' suggestion that the lockout rested on animus toward the Unions, instead of a response to the inside game.

Because the Unions were using the inside game as an economic weapon to force CIPS to accede to their bargaining position, CIPS was entitled to respond with its own economic weapons. As the Board reasonably concluded:

> Respondent's lockout was simply its economic weapon in response to the Unions' economic weapon. Thus, the lockout was both a weapon in support of the Respondent's bargaining position and a weapon in opposition to the Unions' weapon which was used in support of the Unions' bargaining position.
>
> .... [I]t makes little sense to say that the lockout was caused by the inside game strategy rather than by the respective bargaining positions of the parties. The truth is that the two are inextricably tied in this case.

App. 28a-29a.

The NLRB has "considerable authority" to interpret the labor laws. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987), and the courts defer to its rulings so long as they are "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). Under this deferential standard, it is for the NLRB – not the courts – to "strike the proper balance between the asserted business justifications and the invasion of employee rights." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983). *Accord, NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The NLRB's actual holding is well within the NLRB's broad discretion. This Petition presents no important question of federal law requiring this Court's review.

II. The NLRB's Holding Is Consistent With, If Not Compelled By, This Court's Precedents.

Since its decision in *American Ship*, this Court has directed the NLRB to take a strict "hands off" approach to the use of economic weapons by either party. Before *American Ship*, the NLRB did prohibit lockouts to improve the employer's bargaining position. Its rationale for doing so was exactly what the Unions now urge:

> In the Board's view, the use of the lockout "punishes" employees for the presentation of and adherence to demands made by their bargaining representatives and so coerces them in the exercise of their right to bargain collectively.

380 U.S. at 308.

American Ship rejected both the NLRB's rule and its rationale. This Court held that there was no § 8(a)(1) violation because the "use of a lockout solely in support of a legitimate bargaining position" was in no way "inconsistent with the right to bargain collectively." 380 U.S. at 310. There was no § 8(a)(3) violation, because the employer's intention was "merely to bring about a settlement of a labor dispute on favorable terms." 380 U.S. at 313:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collec tively does not entail any "right" to insist on one's position free from economic disadvantage.

380 U.S. at 309. The NLRB explicitly relied on this part of *American Ship* in its decision in the instant case. App. 25a.

In *NLRB v. Brown*, 380 U.S. 278 (1965) (*Brown Food*), this Court extended the principle to a lockout designed to preserve the employers' bargaining power, rather than to advance any particular proposal. The union struck one of the five employers in a multi-employer bargaining unit. The other four locked out their employees, hired temporary replacements, and informed the employees "that they would be recalled to work when the strike . . . ended." 380 U.S. at 281.

The NLRB held that this was unlawful, because the lockout and temporary replacements inhibited a lawful strike. This Court disagreed:

> In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3).

380 U.S. at 283.

Brown Food clearly supports, and probably requires, the NLRB's decision in the instant case. The employers in *Brown Food* did not condition the end of the lockout on the achievement of a collective bargaining agreement. They conditioned it on an end to the strike – an activity "no less protected than the inside game" in the instant case. App. 25a. If an employer can condition the end of a lockout on ending a strike, a lockout designed to "force the Unions to cease their inside game" must be lawful. App. 25a.

Brown Food allowed all members of a multi-employer group to lock out the union in response to a whipsaw strike against one of the employers. 380 U.S. at 281. The same principle would permit a single employer with multiple facilities to lock out all of its employees in response to a strike directed to a single facility. In the instant case, the Unions effectively struck every time they implemented one of the inside game tactics – *e.g.*, refusing overtime. A lockout of all employees in response to such a strike is identical in principle to locking out all employees in response to a strike at a single facility. *Brown Food* is compelling precedent for the NLRB's decision in the instant case.

In *Machinists*, the union engaged in a concerted refusal to work overtime, in order to put economic pressure on the employer. A state labor relations board found that this practice violated state law and enjoined it. The issue before this Court was whether federal labor law preempted the state law. This Court held that state law was preempted, because Congress intended that the parties' economic weapons "were not to be regulable by States any more than by the NLRB." 427 U.S. at 149.

Machinists explicitly overruled *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949) (*Briggs-Stratton*). 427 U.S. at 154. The reason was that *Briggs-Stratton* had assumed that the employer could not resort to its own economic weapons in response to inside game tactics such as a concerted refusal to work overtime – an assumption that was wrong:

> [E]ven were the activity presented in the instant case "protected" activity within the meaning of § 7, economic weapons were available to counter the Union's refusal to work overtime, e.g., a lockout ....

427 U.S. at 152-53. As noted, *Machinists* invited the NLRB to adopt the very holding that it reached in the instant case: the inside game may be protected activity, but "not so protected as to preclude the use of available countervailing economic weapons by the employer." 427 U.S. at 152 n.14.

The foregoing quotations may be dicta, in that they are not absolutely essential to the preemption holding. As the central reason for overruling a prior precedent of this Court, however, these remarks are "'an important part of the Court's rationale for the result it reache[d],'" and thus "'entitled to greater weight.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), *quoting Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring). As the NLRB stated, App. 31a n.19, it does find Supreme Court dicta "instructive" in interpreting federal labor law – a reasoned conclusion that is itself entitled to deference.

Allowing the employer to meet force with force is the only way to comply with this Court's holding that the NLRB is not the "arbiter of the sort of economic weapons the parties can use" in collective bargaining negotiations. *Insurance Agents*, *supra*, 361 U.S. at 497. Obviously, the lockout puts additional pressure on the union to end the inside game or accept the employer's proposals. Just as in *Brown Food*, "these effects are no different from those that result from the legitimate use of any economic weapon by an employer." 380 U.S. at 286.

By contrast, the Unions want to have their cake and eat it too. Their position is that they can deploy the inside game as an economic weapon but the employer cannot respond with its own economic weapons. As the

NLRB found, App. 21a, the Unions chose the inside game precisely because they thought it was "as effective as the strike but without the risk." In the long run, allowing a union to tilt the playing field like that will produce more disputes rather than fewer:

> [B]oth employers and employees should have the unrestrained opportunity to exert or threaten economic pressure upon each other. To the extent this opportunity is limited, the parties have less to lose by intransigence and are less likely to make concessions for settlement.

Note, 85 *Harv. L. Rev.* 680, 685-86 (1972).

The Unions claim that *American Ship* is limited to temporary layoffs "*solely* as a means to bring economic pressure" in support of the employer's bargaining position. Pet. at 21 (emphasis by the Unions). They claim that the instant case involves "a desire to retaliate for protected, concerted activity" for the purpose of "forcing the employees to end that activity." *Id.*

This theory entirely ignores the NLRB's holding that there is no meaningful distinction between a lockout in support of the employer's bargaining position and a lockout in response to the inside game:

> [T]he inside game continued to be a weapon to achieve the Unions' bargaining position. That bargaining position was contrary to the Respondent's bargaining position. It would seem to follow that a lockout in opposition to the inside game is perforce a lockout in opposition to the Unions' bargaining position, and in support of Respondent's bargaining position.

App. 29a-30a.

The Unions claim that *American Ship* allows lockouts only to support the employer's bargaining position – not those that are hostile to the bargaining process. Pet. at 21-22. Because the lockout was an economic weapon deployed in response to the Unions' own economic weapon, it was inherently supportive of the bargaining process. In briefing before the NLRB, Local 702 acknowledged that CIPS would have instantly terminated the lockout if the Union gave in to CIPS' bargaining position, and it derided any suggestion to the contrary as "absurd" and "ridiculous."

The Unions' discussion of *Brown Food* is pure semantics. They seize on the word "reprisal," which the NLRB quoted from the ALJ's decision, and argue that *Brown Food* involved no evidence of reprisal. Pet. at 22-23. The word "reprisal" can have two meanings. It can mean hostility to the Unions and a desire to punish them, which would convert an otherwise legal lockout into an unfair labor practice; the NLRB rejected that theory on the facts. App. 34a. Alternatively, the word can mean "in response to," and that is clearly what the NLRB meant to find: that CIPS had used the lockout "in response to" the inside game. App. 21a.

The Unions assert that *Brown Food* "did *not* sanction lockouts 'responsive' to whipsaw strikes." Pet. at 23 (emphasis original). The Unions are simply wrong. In *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) (*Buffalo Linen*), the employers told the union that the lockout was "because of the Frontier strike," and would end if the union "ended the strike." 353 U.S. at 90. This Court nonetheless held that the lockout was lawful. In *Brown Food*, this Court described its holding in *Buffalo Linen*:

> [I]n the absence of specific proof of unlawful motivation, the use of a lockout by members of a multiemployer bargaining unit *in response to* a whipsaw strike did not violate either § 8(a)(1) or § 8(a)(3).

380 U.S. at 281-82 (emphasis added).

At bottom, this petition rests on the theory that a lockout in response to the inside game in and of itself establishes unlawful motivation. *Buffalo Linen* implicitly and *Brown Food* explicitly reject that theory. That is why *Machinists* plainly states that a lockout is a lawful, legitimate response to a union's use of economic weapons such as the inside game. The NLRB's opinion is consistent with, if not compelled by this Court's precedents.

III. The NLRB's Holding Is Consistent With, If Not Compelled By, Its Own Precedents.

The Unions claim that a "long and unbroken line" of NLRB precedents holds that retaliation against protected activities is an unfair labor practice. Pet. at 14. They assert that the purpose of this lockout was to retaliate against the Unions for using the inside game and claim that "lockouts in reprisal for employees' concerted, protected activities" are unfair labor practices. Pet. at 15.

There are two fundamental flaws in these grandiose assertions. First, the Unions assume that a lockout in response to the use of an economic weapon by a union, standing alone, is unlawful retaliation. As noted, this Court's precedents hold exactly the opposite. Second, the Unions assume that there is some meaningful distinction between a lockout in support of an employer's

bargaining position and a lockout in opposition to a union's deployment of economic weapons. They never address the NLRB's holding that these are merely two sides of the same coin.

Thus, it is unsurprising that none of the Unions' lockout cases support their theory.[2] In *Highland Superstores*, 314 NLRB 146 (1994), the employer announced its intention to subcontract some unit work. The union issued handbills urging a consumer boycott of Highland. Highland then threatened to terminate any employee who distributed a handbill.

The NLRB regarded the handbilling as an "economic action by the union." 314 NLRB at 146. It held that "an employer can ordinarily take economic action" in response to the union's economic action in support of a lawful bargaining position. *Id.* Based on "the specific facts of this case," the NLRB found that the employer had acted "to punish the employees for their handbilling, rather than in support of its bargaining position." *Id.* Those "specific facts" were that the employer's conduct:

> was a threat to terminate, not simply a threat to lockout. In addition, the Respondent did not explain, until the hearing, that its lockout was in support of its bargaining position.

Id.

In the instant case, CIPS never threatened to terminate anyone and the Unions knew at all times that the lockout would end if they capitulated. App. 32a. The NLRB specifically "rejected[ed]" the ALJ's findings that

---

[2] Most of the Unions' "long and unbroken line" of cases, Pet. at 14-15, have nothing to do with lockouts.

the purpose of the lockout was "to 'punish'" the employees. App. 34a. Given the NLRB's factual findings in the instant case about CIPS' motives, *Highland Stores* requires application of the ordinary rule that "an employer can . . . take economic action" in response to the Unions' economic action. 314 NLRB at 146.

In *Riverside Cement Co.*, 296 NLRB 840 (1989), the employer implemented its final offer, which included several articles taken directly from the expired agreement. The custom and usage of the parties under one such article gave the employees discretion on whether to bring their own hand tools. The employer demanded that the employees provide their own hand tools and denied work to those who did not. For two reasons, the NLRB rejected the employer's argument that this was a lawful lockout.

First, the "denial of work was limited to only those employees" who refused to supply their own hand tools. 296 NLRB at 842. As the Court of Appeals observed in the instant case, the lockout was unit-wide. App. 12a. That distinction is critical. Section 8(a)(3) prohibits "discrimination against employees who participate in concerted activities protected by § 7." *Metropolitan Edison, supra*, 460 U.S. at 703. Locking out only those employees who engage in protected activities would penalize only those who actively support the union. In every case in which this Court has found conduct to be inherently destructive of unit members' rights, "the employer treated employees *within* a bargaining unit differently depending upon the degree of their union activity." *Int'l Paper v. NLRB*, 115 F.3d 1045, 1050 (D.C. Cir. 1997) (emphasis original).

Moreover, allowing an employer to suspend only the union activists would not inflict enough pain on the employer who attempts it. The economic weapons that the parties can use serve the goal of collective bargaining, because they hurt the party that invokes them as well as the other party. For example, a strike may pressure the employer, but the unit members have to do without a paycheck for its duration. An employer who locks out its workers is "unlikely [to] ... fare well" using inexperienced replacements, because the business "will operate less efficiently." *Int'l Brotherhood of Boilermakers v. NLRB*, 858 F.2d 756, 767 (D.C. Cir. 1988). If the employer could lock out only the union activists, while retaining the other experienced employees, this disadvantage would vanish. Thus, it is reasonable to distinguish between suspensions of only the activists and lockouts of everyone.[3]

The NLRB's second rationale in *Riverside* was that the employer had not acted "to support a legitimate bargaining position." 296 NLRB at 842. Rather, its action was "contrary to . . . the relevant condition of employment." *Id.* n.10. Thus, as the NLRB found, App. 33a n.20, the employer had unilaterally changed the terms of its own implemented final offer. By definition, a lockout in support of an unlawful bargaining position is itself unlawful, and the NLRB properly distinguished *Riverside* on that basis. App. 33a n.20.

---

[3] The Unions' suggestion that this distinction "explains nothing and justifies nothing," Pet. at 19, ignores the unique context of lockouts in support of an employer's bargaining position. None of the Unions' cases arise in that context, so none are in point.

The Unions' final lockout authority is *Thrift Drug Co.*, 204 NLRB 41 (1973), *enforced*, 491 F.2d 751 (3d Cir. 1974). They quote a portion of the ALJ's opinion to the effect that suspension of a single union activist was illegal because its primary purpose was to protect the employer against the union's economic weapons, rather than to support the employer's bargaining position. Pet. at 16. The NLRB did not adopt that portion of the ALJ's opinion.

The ALJ apparently found the employer's conduct illegal for three independent reasons:

A. The purpose of the lockout was to protect the employer "against the Union's economic weapons," rather than to place "an economic burden on the union members in support of the Employer's contract position."

B. The "selection of Mrs. Peterson because of her activities on the picket line was discriminatory."

C. Continuing operations with the other employees violated *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

204 NLRB at 43.

In affirming, the majority of the NLRB adopted only the second of these rationales. "Members Kennedy and Penello rely ***solely*** on [the] finding that Peterson was unlawfully selected for suspension because of her activities on behalf of the Union." 204 NLRB at 41 n. 2 (emphasis added). Member Jenkins also relied on the *Inland Trucking* theory. *Id.* No one endorsed the first

theory, and no subsequent authority has ever relied on it. The NLRB does not treat unexcepted findings of an ALJ as precedent. *Carpenters Local 370 (Eastern Contractors Assn, Inc.)*, 332 NLRB No. 25, at 2 n.2 (2000). An ALJ opinion that the NLRB does not adopt cannot be valid precedent either. II Davis & Pierce, *Administrative Law Treatise*, § 9.9 at 97 (3d Ed. 1994) ("The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision").

Consistent with this Court's precedents, the NLRB has adopted a general rule that an employer may deploy its own economic weapons in response to a union's resort to economic weapons. That does not discriminate against the union. Instead, it creates a level playing field in which both sides are free to use their economic weapons without intrusive oversight by the NLRB.

Conclusion

For these reasons, the petition for certiorari should be denied.

Respectfully Submitted,
HUSCH & EPPENBERGER, LLC
By:
Arthur L. Smith
Counsel of Record
Stuart I. Cohen
Robert S. Seigel
100 North Broadway, Suite 1300
St. Louis, MO 63102
Office: (314) 421-4800
Fax No: (314) 421-0239

Attorneys for Intervenor
Central Illinois Public Service Co.

Supreme Court, U.S.
FILED
NOV 8 2000
CLERK

(4)

No. 00-359

In the Supreme Court of the United States

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 148, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LEONARD R. PAGE
General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

17 pp

QUESTION PRESENTED

Whether the National Labor Relations Board permissibly concluded that an employer did not commit an unfair labor practice, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by locking out union employees in response to "inside game" tactics during contract negotiations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

American Ship Bldg. Co. v. *NLRB*, 380 U.S. 300 (1965)	2, 7, 10
Highland Superstores, Inc., 314 N.L.R.B. 146 (1994)	12
Lodge 76, Int'l Ass'n of Machinists v. *Wisconsin Employment Relations Comm'n*, 472 U.S. 132 (1976)	11
Molon Motor & Coil Corp. v. *NLRB*, 965 F.2d 523 (7th Cir. 1992)	11
Movers & Warehousemen's Ass'n v. *NLRB*, 550 F.2d 962 (4th Cir.), cert. denied, 434 U.S. 826 (1977)	11
NLRB v. *Brown*, 380 U.S. 278 (1965)	3, 10
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)	4
NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)	3, 4, 7
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983)	12
NLRB v. *Zelrich Co.*, 344 F.2d 1011 (5th Cir. 1965)	11
Reno Hilton Resorts v. *NLRB*, 196 F.3d 1275 (D.C. Cir. 1999)	12

Cases—Continued: Page

Riverside Cement Co., 296 N.L.R.B. 840 (1989) 12
Thrift Drug Co., 204 N.L.R.B. 41 (1973), enforced, 491 F.2d 751 (3d Cir. 1974) 13

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 ..... 2, 7, 10, 11
§ 8, 29 U.S.C. 158 ..... 7, 8, 12
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 3, 6
§ 8(a)(3), 29 U.S.C. 158(a)(3) 2, 3, 6

In the Supreme Court of the United States

No. 00-359

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 148, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 215 F.3d 11. The decision and order of the National Labor Relations Board (Pet. App. 15a-262a) are reported at 326 N.L.R.B. 928.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2000. On July 31, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 6, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to bargain collectively and the right to engage in concerted activity for the purpose of collective bargaining. Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

This Court held in *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), that employers do not violate Section 8(a)(1) or Section 8(a)(3) by locking out their employees in order to place economic pressure on the employees' union during a bargaining dispute. Such a lockout does not violate Section 8(a)(1) because "the employer's use of a lockout solely in support of a legitimate bargaining position is [not] in any way inconsistent with the [employees'] right to bargain collectively or with the right to strike." 380 U.S. at 310. Such a lockout also does not violate Section 8(a)(3) because "use of the lockout [in bargaining] does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such." *Id.* at 312. Therefore, when the employer's intention "is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8(a)(3) is shown." *Id.* at 313.

In a companion case, *NLRB* v. *Brown*, 380 U.S. 278 (1965), the Court determined that there likewise is no per se violation when the employer, having lawfully locked out employees during a strike, takes the additional step of hiring temporary replacement workers. Hiring temporary replacement workers might discourage union membership, but that tendency is "comparatively remote," whereas the practice advances a "legitimate business end." *Id.* at 289. Any improper motivation of the employer therefore must be established by independent evidence, apart from the fact of the lockout and hiring of replacement workers. *Id.* at 288-289.

Based largely upon its holdings in *American Ship Building Co.* and *Brown*, the Court later articulated a two-step framework for analyzing alleged violations of Section 8(a)(3). See *NLRB* v. *Great Dane Trailers, Inc.*, 338 U.S. 26 (1967). The National Labor Relations Board (Board) may find a violation "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights"—regardless of the evidence concerning the employer's actual motivation. *Id.* at 34. If the employer engages in conduct that is discriminatory and "could have adversely affected employee rights to *some* extent," but is not so inherently destructive of employee rights that an unlawful motive can be presumed, then the employer can avoid a finding of a violation by proving a legitimate motive for its conduct. *Ibid.*[1]

---

[1] The same principles apply to alleged violations of Section 8(a)(1) when, as is generally the case, the Section 8(a)(1) claim is derivative of a claim under Section 8(a)(3). See *NLRB* v. *Fleet-*

The present case involves the Board's application of those settled legal principles to an employer lockout during contract negotiations.

2. Respondent Central Illinois Public Service Company (CIPS) is a public utility that furnishes electricity and natural gas throughout central and southern Illinois. Some of CIPS's production, maintenance, and operational employees are represented by petitioner Local Union 702 of the International Brotherhood of Electrical Workers. Others are represented by petitioner Local Union 148 of the International Union of Operating Engineers. Pet. App. 17a.

CIPS's separate collective bargaining agreements with the two unions expired in June 1992. CIPS and the unions continued to negotiate new agreements. In March 1993, CIPS provided a "final" contract offer to each union. The employees in both unions voted to reject CIPS's offer. Rather than striking, however, the employees in both unions voted to remain on the job and pursue an "inside game" strategy designed to put pressure on CIPS to accede to the unions' bargaining demands. Pet. App. 2a-3a, 17a-18a. The inside game strategy consisted of refusals to work voluntary overtime and of "work-to-rule" tactics such as adhering strictly to all company rules, doing exactly and only what the employee had been told to do, reporting to work precisely on time, leaving work trucks at company facilities during non-duty hours (thus precluding responses to after-hours emergencies), presenting all grievances as a group, advising non-employees to report unsafe conditions, and advising customers of their rights to information from CIPS and to have their

---

wood Trailer Co., 389 U.S. 375, 378 (1967); see also *Great Dane Trailers*, 388 U.S. at 30, 32.

meters checked annually for accuracy. *Id.* at 2a-3a. The union employees commenced their inside game campaign on April 24, 1993, and the parties continued to negotiate. *Id.* at 3a.

During the inside game campaign, CIPS's industrial relations manager, Charles Baughman, confronted a Local 702 representative with a union document outlining the work-to-rule activities and stated that CIPS "was not going to put up with" the activities. Later, after CIPS and Local 702 settled a particular grievance presented by union employees as a group, Baughman stated that he was "not going to tolerate these mass grievance meetings" in the future. Pet. App. 18a.

On May 20, 1993, CIPS locked out all employees in the bargaining units represented by the two unions. Baughman explained that CIPS's decision was a response to the unions' inside game activities. Pet. App. 18a-19a. In a form letter sent to Local 702 unit employees on May 20, CIPS's Chief Executive Officer elaborated on the reasons for the lockout, stating that:

> Based on the events of the last few weeks, I do not feel there is any other alternative. During this period, the Company has failed to receive what it is entitled to from employees represented by IBEW Local 702 in return for the wages and benefits which make it possible for you to provide your families with security and well-being. We have consistently encountered refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel. These conditions are neither acceptable nor warranted.

Id. at 18a-19a. The form letter described the unsuccessful contract negotiations over the previous year,

and what CIPS had done to address union demands. *Id.* at 26a-27a. The letter stated that the unions' rejection of CIPS's latest contract proposal, together with an intensification of the inside game campaign, led to the lockout. The letter concluded:

> Like you, I am anxious to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date. I sincerely regret the disruption this decision will bring into your lives. My hope is that this aspect of our labor dispute is short-lived.

Id. at 27a. An attachment to the letter summarized the changes to the expired contract that CIPS and Local 702 had "agreed upon or which remain a part of the company's offer." *Ibid.* Employees represented by Local 148 received a similar form letter. *Ibid.*

After locking out the union employees, CIPS continued its operations without hiring replacement workers. Pet. App. 93a. CIPS continued to negotiate with both unions. On June 14, 1993, CIPS and Local 148 agreed on a new contract. After that agreement was signed on June 21, CIPS ended the lockout against Local 148, but the Local 148 employees refused to return to work as a show of support for Local 702. On August 25, 1993, CIPS ended the lockout of Local 702 employees, although CIPS and Local 702 did not reach agreement on terms for a new contract until January 1994. *Id.* at 19a.

3. The unions filed unfair labor practice charges with the Board, alleging in relevant part that the lockout violated Sections 8(a)(1) and 8(a)(3) of the Act. Pet. App. 3a. Following a hearing, an administrative law judge (ALJ) concluded that CIPS violated those provisions of the Act because the inside game campaign

constituted protected activity and the lockout was intended as punishment for that activity. *Id.* at 232a-248a.

The Board reversed the ALJ and dismissed the unions' claims regarding the lockout. Pet. App. 15a-35a. The Board assumed that the unions' inside game tactics were protected activity under Section 7 of the Act. *Id.* at 21a. But applying the analytic framework set out in *Great Dane Trailers*, *supra*, the Board concluded that CIPS's lockout did not violate Section 8. Pet. App. 21a-35a.

The Board first found, in accordance with *American Ship Building Co.*, that "the lockout in the instant case, standing alone, cannot be considered inherently destructive of employee rights." Pet. App. 23a-24a. The Board therefore proceeded to determine whether CIPS possessed a legitimate and substantial business justification for the lockout. *Id.* at 24a. Overruling the ALJ, the Board concluded that, even if the sole objective of the lockout had been to force the unions to cease their inside game activities, this was not an impermissible objective. The unions adopted their inside game strategy "in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts." *Id.* at 25a. Under that circumstance, CIPS's decision to defend itself with a lockout, in order to force the unions to yield in the contract negotiations, was consistent with the principle "that the 'right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage.'" *Ibid.* (quoting *American Ship Building Co.*, 380 U.S. at 309).

The Board's assumption that the inside game strategy constituted protected activity did not change the analysis. The Board noted that the employees' strike in

Brown was protected under Section 7, yet the *Brown* Court determined that the employer's responsive lockout and hiring of replacement workers did not violate Section 8. Pet. App. 25a-26a.

The Board further found that forcing the unions to end their inside game tactics was not the only objective of CIPS's lockout. Contrary to the ALJ, the Board determined that "a fair reading of" CIPS's May 20 letter to union employees showed that the goal of the lockout was not only to stop the inside game, but also to obtain a "resolution of issues that were dividing the parties in their bargaining negotiations." Pet. App. 26a. "The message conveyed," the Board found, was that CIPS "wanted employees to be allowed to review and consider its most recent contract proposals." *Id.* at 28a. The Board held that "application of economic pressure in support of [CIPS's] bargaining position constitutes a legitimate and substantial business justification for the lockout." *Ibid.* Moreover, there was no evidence to suggest that the lockout was intended to undermine the collective bargaining process; CIPS's good-faith contract negotiations and history of accepting the unions' representative status were in fact inconsistent with an inference of antiunion animus. *Id.* at 33a-35a.[2]

Board Member Liebman dissented. She agreed with the ALJ that the lockout was motivated by antiunion animus and was not justified by legitimate and substantial business objectives. Pet. App. 43a-66a.

---

[2] The Board found that CIPS violated Section 8 by terminating health insurance coverage and failing to pay certain workers' compensation benefits during the lockout, and by failing to provide information Local 702 requested. These violations, however, did not support an inference that the lockout was motivated by unlawful considerations. Pet. App. 36a-40a. CIPS did not appeal the Board's findings that CIPS violated Section 8 in these respects.

4. The court of appeals denied the unions' petitions for review. Pet. App. 2a. The court found reasonable the Board's conclusion that CIPS's use of a lockout in response to the economic pressure of inside game tactics was justified. *Id.* at 8a. The May 20 form letters and other evidence also supported the Board's determination that CIPS legitimately sought to resolve the contract negotiations through the lockout. *Id.* at 8a-10a, 13a. Finally, the record did not contain other evidence establishing antiunion animus. *Id.* at 10a, 12a-14a.

Citing *American Ship Building Co.* and *Brown*, the court of appeals rejected the argument that the lockout was necessarily unlawful because it was intended, at least in part, to end the unions' assumedly protected inside game activities. Pet. App. 11a. The court of appeals also rejected the unions' claim that the Board had departed from its prior decisions. *Id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of any other court of appeals. Nor is there any inconsistency in the Board's own decisions. Further review therefore is not warranted.

1. Petitioners do not dispute (Pet. 9 n.6) that CIPS locked out its union employees at least in part to support CIPS's bargaining position in contract negotiations —without regard to the unions' inside game activities. Petitioners instead seek to distinguish CIPS's admittedly lawful use of the lockout to advance its bargaining position from CIPS's allegedly unlawful use of the lockout as "retaliation" (Pet. 13) for the unions' inside game strategy. Yet the Board rejected the ALJ's finding of retaliation (Pet. App. 240a, 242a) because it was incon-

sistent with the record evidence. *Id.* at 28a-35a. The Board explained that the inside game strategy was "an economic weapon used in support of the Unions' bargaining position and against [CIPS's] bargaining position." Insofar as the lockout was directed at ending the inside game strategy, it was an "economic weapon in response to the Unions' economic weapon." *Id* at 28a. No evidence suggested antiunion animus. *Id.* at 30a-35a.

The court of appeals upheld the Board's assessment of the record evidence (Pet. App. 10a, 12a-13a), and petitioners have not sought review on that issue. In fact, petitioners accept that "this Court does not sit to resolve evidentiary disputes." Pet. 10 n.6. This case accordingly is governed by the Court's holding in *American Ship Building Co.* that a lockout designed "merely to bring about a settlement of a labor dispute on favorable terms" is not an unfair labor practice. 380 U.S. at 313; see *Brown*, 380 U.S. at 284 (same).

The Board did not "privileg[e] employer lockouts in reprisal for employee protected, concerted activity." Pet. (i); see also Pet. 10-13. Rather, the Board, affirmed by the court of appeals, found that CIPS locked out its employees (1) to neutralize the unions' economic weapon in the contract negotiations, and (2) to resolve the contract issues that were dividing the parties. Pet. App. 25a-26a, 28a-30a. The lockout was "in opposition to the Unions' bargaining position," not in opposition to the employees' right to engage in protected Section 7 activity. *Id.* at 30a.

The Board specifically did not address "a situation where a lockout is in response to protected activity that is unrelated to a union's bargaining position." Pet. App. 30a n.18. Likewise, this case does not present a situation in which an employer's legitimate economic moti-

vation for a lockout was mixed with antiunion animus. Under the facts presented here, petitioners' recognition that "a true employer bargaining lockout is lawful" (Pet. 10 n.6) resolves the case.

2. As explained above, the Board properly applied both *American Ship Building Co.* and *Brown*. The Board's decision also is in accord with *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). In that case, the Court held that the Act preempted a State from interfering with employees' concerted refusal to work overtime during a bargaining dispute. In so ruling, the Court noted that the employer had legitimate economic tools of its own. For instance, even if the employees' refusal to work overtime constituted a protected Section 7 activity, the employer could have responded with a lockout in order to put economic pressure on the union. *Id.* at 152-153. The option suggested by the Court in *Machinists Lodge 76* is the very one CIPS implemented in this case.

Nor is there any conflict between the court of appeals' decision in this case and decisions of other courts of appeals. Because the Board determined that CIPS did not act with an antiunion motive, the retaliation cases cited by petitioners (Pet. 14-15, 17 n.9) are inapposite. As petitioners themselves suggest, those cases address "adverse employer action based on an improper motive." Pet. 14; see, *e.g.*, *Molon Motor & Coil Corp.* v. *NLRB*, 965 F.2d 523 (7th Cir. 1992) (discharge motivated by antiunion animus); *Movers & Warehousemen's Ass'n.* v. *NLRB*, 550 F.2d 962 (4th Cir.) (lockout motivated in part by desire to influence union's procedure for ratifying contract), cert. denied, 434 U.S. 826 (1977); *NLRB* v. *Zelrich Co.*, 344 F.2d 1011, 1014 (5th Cir. 1965) (Christmas bonuses withheld

to discourage membership in the union, and as retaliation for employees' majority vote for the union); see also *Reno Hilton Resorts* v. *NLRB*, 196 F.3d 1275, 1282-1285 (D.C. Cir. 1999) (contracting out motivated by antiunion animus).[3]

Finally, there is no inconsistency in the Board's own decisions—an issue that would not warrant a grant of certiorari in any event. Petitioners rely on Board determinations that "employer lockouts in reprisal for employees' concerted, protected activities do[] violate §§ 8(a)(1) and 8(a)(3)." Pet. 15. Yet the Board found in this case that CIPS's lockout was not a "reprisal," but rather an economic weapon used in support of CIPS's bargaining position and in opposition to the unions' chosen economic weapon. As the court of appeals noted (Pet. App. 11a-12a), that finding renders inapposite the Board precedents relied upon by petitioners (Pet. 15-16).

In *Highland Superstores, Inc.*, 314 N.L.R.B. 146 (1994), for example, the Board found a Section 8 violation where the employer punished union employees for handbilling in support of a consumer boycott, and "there [wa]s no merit to the Company's claim that it locked its employees out to pressure the Union at the bargaining table." *Id.* at 148. In *Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), the Board found that a lockout was unlawful because the employer had not acted "to support a legitimate bargaining position," but rather, to enforce a new workplace rule that was inconsistent

---

[3] For the same reason, this case is not governed by *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). See Pet. 14 n.7. That case addressed situations in which "a discharge or other adverse action [was] based in whole or in part on antiunion animus." 462 U.S. at 401.

with the governing terms of employment. 296 N.L.R.B. at 842 & n.10. Finally, in *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973), enforced, 491 F.2d 751 (3d Cir. 1974), the employer suspended only a lone employee whose picketing on behalf of the union had stopped deliveries, while taking no action against other picketing employees whose picketing did not have that effect. This singling-out was discriminatory and reflected that the employer's real concern was stopping the employee from picketing at the delivery entrance, not advancing the employer's position in the ongoing collective bargaining negotiations with the union. 204 N.L.R.B. at 41 n.2, 42-43. *Thrift Drug* thus did not present the question "whether an employer may or may not lock out its employees in a unit for the purpose of bringing economic pressure to bear on the employees to accept the employer's collective-bargaining position" (*id.* at 43), which is the issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LEONARD R. PAGE
General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

NOVEMBER 2000

(5)

No. 00-359

Supreme Court, U.S.
FILED
NOV 20 2000

IN THE

Supreme Court of the United States

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

LOCAL UNION 148, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314) 621-2626

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105
(312) 727-1015

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) ..... *passim*
Frazier Indus. Co. v. NLRB, 213 F.3d 750 (D.C. Cir. 2000) 6
Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 4
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 5, 6
Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir. 1977) 3
NLRB v. Brown Food Store, 380 U.S. 278 (1965) ..... *passim*
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 6, 7
Riverside Cement Co., 296 N.L.R.B. 840 (1989) 8
Traction Wholesale Ctr. Co. v. NLRB, 216 F.3d 92 (D.C. Cir. 2000) 6

STATUTES

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 7, 29 U.S.C. 157 ..... *passim*
§ 8(a)(1), 29 U.S.C. 158(a)(1) ..... *passim*
§ 8(a)(3), 29 U.S.C. 158(a)(3) ..... *passim*

OTHER

American Heritage Dictionary of the English Language (4th ed. 2000) 5
Black's Law Dictionary (6th ed. 1990) 5
Bryan A. Garner, *Dictionary of Modern Legal Usage* (1985) 5
Webster's Third International Dictionary (1986) 5

REPLY BRIEF FOR PETITIONERS

Testing the limits of Joe Louis' boxing axiom—"He can run but he can't hide"—the National Labor Relations Board's ("NLRB's"), and the Central Illinois Public Service Company's ("CIPS,"), Briefs in Opposition go to great lengths *not* to engage the Question Presented by our *certiorari* petition.

Both opposition briefs stake out the claim that the NLRB and the D.C. Circuit limited themselves to deciding a quite different—and legally banal—employer lockout question; that this case thus presents that well-defined, well-settled question; and that it follows *a fortiori* that there is no basis for a *certiorari* grant here. As their means of perfecting that claim, both opposition briefs proceed by eliding the NLRB's basic, independent, and dispositive ruling in this case—affirmed by the Court of Appeals as such—*viz.*, by eliding the very ruling the *certiorari* petition addresses and requests the Court to consider.

Given how little of substance Respondents have to call on, we cannot fault them for lacking the courage of their convictions. But as we now show, the fact of the matter is that both the Board and the Court of Appeals *did* decide the important and unsettled Question Presented in our *certiorari* petition, that the Board and the court below did so wrongly, and that their error calls for this Court's correction.

1. The gist of the NLRB Opposition Brief is that this case, as decided by the Board and the Court of Appeals, is a case involving a "bargaining lockout"—a lockout to secure a collective bargaining agreement on the employer's terms—on all fours with *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and as such "is governed by the Court's holding in *American Ship Building Co.* that a lockout designed 'merely to bring about a settlement of a labor dispute on favorable terms' is not an unfair labor practice." NLRB Opp. Br. 9-10 (quoting 380 U.S. at 313). According to that brief:

> The Board did not "privileg[e] employer lockouts in reprisal for employee protected, concerted activity." Rather, the Board, affirmed by the court of appeals, found that CIPS locked out its employees (1) to neutralize the unions' economic weapon in the contract negotiations, and (2) to resolve the contract issues that were dividing the parties. The lockout was "in opposition to the Unions' bargaining position," not in opposition the employees' right to engage in protected Section 7 activity. [NLRB Opp. Brief at 10 (citations omitted).]

The premise of this syllogism is false in that this statement of what the Board found and what the Board held cannot be squared with what the Board in fact found and what the Board in fact held in its basic, independent, and dispositive first ruling herein. As the Court of Appeals stated: "*The Board . . . expressly accepted the ALJ's finding that the lockout was implemented 'in reprisal' for the inside game . . . .*" Pet. App. 12a (citing Pet. App. 85a (ALJ Opinion), 19a (NLRB Opinion)) (emphasis added). And, to quote the Court of Appeals again, the first of the Board's two independent rulings in this case holds that this reprisal motive is "not . . . impermissible." Pet. App. 12a.[1] In that regard, the Board

---

[1] In its second ruling, the Board went on to hold that CIPS had a second objective—"resolution of the issues that were dividing the parties in their bargaining negotiations," and that, under *American Ship* and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), this was plainly a lawful objective. Pet. App. 26a. The Court of Appeals affirmed this Board ruling as well. Pet. App. 9a, 13a.

In our view, the Board's second ruling rests on an erroneous determination of fact—*viz.*, that CIPS had any such "bargaining resolution" motive for the lockout. But because the Board applied the correct legal rule under *American Ship* and *Brown Food* to this erroneous finding, this case-specific factual error does not reach beyond the instant dispute, and we have thus acknowledged that this ruling is not a meet subject for this Court's review. *See* Pet. 9-10 n.6.

stated "even assuming as true that the sole objective of the lockout was to force the Unions to cease their inside game activities, such is not an impermissible business objective." Pet. App. 25a. The Court of Appeals in its turn affirmed the Board's ruling as "reasonable." Pet. App. 8a.

It could not be more plain, then, that the Board's first ruling here is—contrary to the NLRB Opposition Brief—a ruling "privileg[ing] employer lockouts in reprisal for employee protected, concerted activity." NLRB Opp. Br. 10.[2] At the risk of undue repetition, that ruling most certainly raises the Question Presented in the *certiorari* petition: "Whether there is an exception—privileging employer lockouts in reprisal for employee protected, concerted activity and with the object of forcing the employees to cease such activities—to the basic National Labor Relations Act antidiscrimination principles . . .?" Pet. (i).

And, to close the circle, the Board's first ruling here is in no way the same as this Court's ruling in *American Ship* that an employer lockout "for the *sole* purpose of bringing economic pressure to bear in support of [the employer's] bargaining position" is lawful. 380 U.S. at 318 (emphasis

---

This second holding does *not*, however, rescue—or obviate review of—the first holding: "[E]ven if a lockout is motivated in part by the wish to exert economic pressure for the lawful purpose of supporting a legitimate bargaining position, the lockout is nevertheless unlawful if also motivated by an intent to interfere with" protected rights. *Movers & Warehousemen's Ass'n v. NLRB*, 550 F.2d 962, 966 (4th Cir. 1977).

[2] The NLRB Opposition Brief, at 11-13, would distinguish the §§ 8(a)(1) and (3) cases we cited in the *certiorari* petition solely on this same erroneous basis: "Because the Board determined that CIPS did not act with an antiunion motive" and because "the Board found in this case that CIPS's lockout was not a 'reprisal,' but rather an economic weapon used in support of CIPS's bargaining position and in opposition to the unions' chosen economic weapon." NLRB Opp. Br. 11, 12.

That effort fails because, as shown in the text, the Board's first ruling here *is* addressed to a reprisal lockout not a bargaining lockout.

added). Nor, as we explained in our *certiorari* petition at pp. 20-24—an explanation nowhere controverted in the NLRB Opposition Brief—does the holding of *American Ship* or that of *Brown Food*, justify the result here.

Simply put, the Court's decisions recognize a carefully delineated privilege—that parallels the employees' "bargaining strike" privilege—allowing an employer to advance its economic interests in the collective bargaining process by locking out its employees for the sole purpose of supporting the employer's bargaining position. And, in so doing, neither decision sanctions an employer lockout in reprisal for employee protected, concerted activity and with the purpose of forcing employees to cease that activity. To the contrary, in concluding that the lockout in *Brown Food*—instituted to preserve the integrity of a multi-employer bargaining unit in anticipation of a whipsaw strike—was lawful, this Court stressed that there was no evidence that the employer "acted . . . in reprisal for the whipsaw strike." 380 U.S. at 282. *See also American Ship*, 380 U.S. at 313 (Employer "measures taken to discourage participation in protected union activities may be found to come within the proscription" of § 8(a)(3)). [3]

---

[3] As *Brown Food* indicates, the Board places more weight on *dicta* from this Court's decision in *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), than it can possibly bear. NLRB Opp. Br. 11.

Machinists held that federal labor law preempts a State order enjoining a union and its members from engaging in a "partial strike" by refusing overtime, where this tactic was implemented during contract negotiations and in tandem with a strike authorization. *See* 427 U.S. at 134, 155. In making that determination, the majority opinion made the passing statement relied upon by the Board: "even were the activity presented in the instant case 'protected' activity . . . economic weapons were available to counter the Union's refusal to work overtime." 427 U.S. at 152-53 (citing *American Ship*).

2. For its part, CIPS' Opposition Brief endeavors to neuter the Question Presented here by cleansing the Board's ruling of the finding that the CIPS lockout was a "reprisal" for the locked-out employees' protected, concerted "inside game" activities.

CIPS urges that "[t]he word 'reprisal' can have two meanings," one of which denotes "hostility to the Unions and a desire to punish them," and the other of which simply means "'in response to,' which is clearly what the NLRB *meant* to find." CIPS Opp. Br. 12 (emphasis added). "Reprisal," according to the standard authorities, is: "In general, any action taken by one person either in spite or as a retaliation for an assumed or real wrong by another." *Black's Law Dictionary* (6th ed. 1990).[4] We have found no authority—either linguistic or legal—for CIPS' novel, putatively innocuous, understanding of that term.

Be that as it may, it is also to the point that the more forthright locution "in reprisal for" (as adopted in the decisions below) and CIPS' proffered euphemism "in response to" are one and the same for the purposes of the NLRA anti-discrimination regime. As we have previously detailed, NLRA §§ 8(a)(1) and (3) prohibit an employer from "discriminati[ng] against employees who participate in concerted activities protected by § 7 of the Act," *Metropolitan*

Fairly read, the *Machinists dicta* suggests that, in a case where a strike was authorized and the union also instituted a "partial strike" through an overtime ban, an employer may institute a properly motivated "bargaining lockout" designed to secure a collective bargaining agreement on the employer's terms. Indeed, given the limited "bargaining lockout" privilege recognized in *American Ship*, the *Machinists* Court's citation to that decision all but demands this reading.

[4] *See also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995) ("*Reprisal*" is "an act of retaliation"); *Webster's Third International Dictionary* (1986) (same); *American Heritage Dictionary of the English Language* (4th ed. 2000)("Retaliation for an injury with the intent of inflicting at least as much injury in return.").

Edison Co. v. NLRB, 460 U.S. 693, 703 (1983), "which includes *discouraging participation in concerted activities*," *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963)(emphasis added). Because the Board ruled that an objective of the lockout "was to force the Unions to cease" their protected, concerted activities, Pet. App. 25a—which more than qualifies as an intent to "discourag[e] participation in concerted activities"—either the descriptive label "in reprisal for" or the label "in response to" affixed to this motive is sufficient to make the legal point.

Hence, even accepting CIPS' locution, a showing that an employer takes adverse employment action—such as the lockout here—"in response to" employee protected, concerted activity—such as the "work-to-rule" activity here—makes out a §§ 8(a)(1) and (3) unfair labor practice. *See Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (*prima facie* violation of §§ 8(a)(1) and (3) is made out on a showing that " 'protected activity was a motivating factor in the adverse employment decision' ") (quoting *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 755 (D.C. Cir. 2000)).

3. In their one feint at the Question Presented—which carefully avoids the substance of the NLRA §§ 8(a)(1) and (3) anti-discrimination regime—the Respondents play a word game: In well-settled NLRA terms an adverse employer action (in the form of, *e.g.*, a lockout or a temporary layoff) in reprisal for employees' protected concerted activities (in the form of "work-to-rule" activities) is a plain §§ 8(a)(1) and (3) unfair labor practice. The opposition briefs—following what the Board dissent properly characterized as the Board majority's "facile logic" that "bootstraps" its conclusion—would have it that calling the work-to-rule activities and the reprisal lockout here "economic weapons" the parties have arrayed against each other, transforms what is in substance an unfair labor practice into privileged employer conduct. *See*

NLRB Opp. Br. 10-12; CIPS Opp. Br. 4-6, 9-11; Pet. App. 28a (NLRB Decision); Pet. App. 56a n. 14 (NLRB Dissent).

CIPS, in particular, gives pride of place to the "economic weapon" label: "Because the Unions were using the inside game as an economic weapon to force CIPS to accede to their bargaining position, CIPS was entitled to respond with its own economic weapons." CIPS Opp. Br. 6. This talismanic use of the term "economic weapon" and the accompanying warfare analogies do nothing to explain why the otherwise applicable §§ 8(a)(1) and (3) prohibitions do not apply here. Rather, it is emotive rhetoric for the proposition that the NLRA privileges any and all employer lockouts in reprisal for any and all employee protected, concerted activity in support of the employees' bargaining position. But nothing in the Act, nothing in any prior decisions of the Board, and nothing in the prior decisions of this Court provides any basis for that proposition.

Indeed, while it is fair enough to say that the NLRA contemplates "economic warfare," it is equally fair to say that the Act—in §§ 7 and 8—states certain Geneva Convention rules of economic warfare. The most basic of these is that adverse employer action designed to "discourag[e] participation in concerted activities" is a §§ 8(a)(1) and (3) unfair labor practice. *Erie Resistor*, 373 U.S. at 233. And, the heart of the matter here is that the Board's reprisal lockout holding works a qualitative diminution of the NLRA anti-discrimination regime and a corresponding qualitative expansion of the bargaining-lockout privilege—and does so without any warrant.

On the theory of the decisions below, a reprisal lockout instituted to defeat protected, concerted activities is *ipso facto* a lawful "economic weapon," so long as the employees' protected activities are in support of their bargaining position. As the Board dissent rightly pointed out, this reasoning is not just contrary to the basic precepts of the NLRA anti-

discrimination regime; it "deal[s] an obvious blow to those exercising Section 7 rights." Pet. App. 43a.

Under the Board's holding, an employer would be privileged to utilize the reprisal lockout weapon simply and solely to defeat employees' exercise of their rights to, for instance, distribute handbills, wear union insignia, or hold rallies in support of their position in bargaining. As Member Liebman observed, this "would allow an employer to respond to any protected activities in support of a union's bargaining position by locking out its employees, whether or not the employer had a specific legitimate business justification, simply because there was an ongoing bargaining dispute." Pet. App. 62a n.24.[5]

* * *

The sum of the foregoing is that the opposition briefs are studies in evasion. We therefore believe it proper to conclude by refocusing this proceeding on what it is really about. To do so we note that in our *certiorari* petition we stated, and

---

[5] It is no answer to say—as CIPS does—that a bargaining lockout that is instituted in anticipation of a strike is lawful. *See* CIPS Opp. Br. 9. First of all, *Brown Food* strongly suggests that a lockout "in reprisal for" anticipated strike activity is unlawful. 380 U.S. at 282. Beyond that, the employees here voted *not* to strike, and the ALJ specifically found that the employees did not engage in a "partial strike" or in any unreasonable "work-to-rule" practices. Pet. App. 169a-170a. The Board did not disturb these findings. Hence, the employees here, like the employees in *Riverside Cement Co.*, 296 NLRB 840, 842 (1989), "were at all times willing and available to work under the terms of the contract . . . ." And, here, just as in *Riverside Cement*:

> The Respondent's actions [in locking out the employees] were taken in response to the employees' decision through the Union to invoke the terms of [the operative collective bargaining agreement provisions]. As such, the Respondent engaged in retaliation for the protected concerted activity engaged in by the employees. Accordingly . . . Respondent violated Section 8(a)(3) and (1) of the Act. [*Id.* (footnote omitted)]

then elaborated on, the following reasons for granting *certiorari* here:

- The decisions below essay a radical break with prior law by legitimizing lockouts in reprisal for NLRA § 7 protected, concerted activity. Given the force of the employer lockout and the importance of the NLRA's legal protections for § 7 activity in realizing the Act's aims, this is a change in the law of the most profound consequence.
- The decisions below, moreover, are contrary to the long line of Board and court authority holding that employer reprisals against employees' protected, concerted activity are a § 8(a)(3) unfair labor practice.
- The reprisal-lockout question of first impression presented here, like its bargaining-lockout predecessors in this Court, is a complex question that goes to the Act's very essence. And, as *American Ship* and *Brown Food* show, the complexities involved in placing the lockout in its proper place in the Act's statutory scheme have proved sufficiently daunting as to require this Court's intervention to maintain the integrity of that scheme.
- Here, as in *American Ship* and *Brown Food*, the Board and the Court of Appeals have gotten things wrong, this time with regard to employee lockouts in reprisal against employee § 7-protected concerted activity. What is more, the Board and the Court of Appeals have gotten things wrong by misreading this Court's *American Ship* and *Brown Food* decisions to go beyond validating bargaining lockouts. The decision below, by extending the bargaining lockout privilege to reprisal lockouts distorts both the Act's protection of employee § 7 rights and the Act's preference for free collective bargaining as a means of mediating conflicting employer and employee *economic interests*, which presupposes those rights and their protection.

The long and the short of it is that the Opposition Briefs do not even come close to rebutting any of these points. That

being so, we submit that the ultimate point we made in our *certiorari* petition holds:

• By reason of the Act's enforcement scheme, unless *certiorari* is granted here the Board's first words privileging employer reprisal lockout will be the authoritative last words on the legality of such lockouts. That being so—and given the nature and magnitude of the Board's error, its destructive impact on § 7 rights as well as its equally destructive impact on the structure of the NLRA legislative scheme—this reprisal-lockout case, like its predecessor bargaining-lockout cases, urgently calls for this Court's review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our *certiorari* petition, the petition should be granted.

Respectfully submitted,

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314) 621-2626

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105
(312) 727-1015

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

Counsel for Petitioner